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No. 96-_____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD W. REESE, RICHARD D. KAUFFMAN, GEORGE R. JORDAN, BETTY SLATER, LARRY L. WYGLE, MARION R. CRAMBLIT, and TIMOTHY WANNER, on behalf of themselves and the class they represent,
Petitioners,

v.

CITY OF COLUMBUS; GREGORY S. LASHUTKA, Mayor, City Of Columbus; LOCAL 1632, OHIO COUNCIL 8, AFSCME; and OHIO COUNCIL 8, AFSCME,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 1996

QUESTION PRESENTED

Do the First and Fourteenth Amendments to the United States Constitution permit a public employer to compel nonunion public employees to contribute, as a condition of their continued employment, to the costs of the following activities engaged in by the state and national affiliates of the bargaining representative imposed upon them by force of law:

a) litigation activities concerning bargaining units other than the employees' unit;

b) public relations and advertising related to issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the employees' bargaining unit; and

c) lobbying related to issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the employees' bargaining unit?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Local 2191, Ohio Council 8, American Federation of State, County and Municipal Employees ("Local 2191"), was initially named as a Defendant in the original proceeding in the United States District Court for the Southern District of Ohio. Local 2191 was dismissed from the action by stipulation of the parties prior to the District Court's entry of judgment. District Court Record 35, Stipulation; District Court Record 39, Order. Accordingly, Local 2191 was not a party to the proceeding whose judgment is sought to be reviewed. *See* Appendix B, *infra*, 3a (*Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995)).

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RICHARD W. REESE, *et al.*,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Richard W. Reese, Richard D. Kauffman, George R. Jordan, Betty Slater, Larry L. Wygle, Marion R. Cramblit, and Timothy Wanner, on behalf of themselves and the class that they represent, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on 19 December 1995, in this case.

OPINIONS BELOW

The Court of Appeals' unreported Order denying the Petition for Rehearing and Suggestion of Rehearing *En Banc* appears in Appendix ("App.") A, *infra*, 1a. The panel opinion (App. B, *infra*, 3a) is officially reported at 71 F.3d 619. The unreported

judgment of the United States District Court for the Southern District of Ohio appears in App. C, *infra*, 14a. The District Court's opinion and order on the Petitioners' Motion for Summary Judgment (App. D, *infra*, 30a) is reported at 826 F. Supp. 1115. Also reproduced in the appendix are the opinion and order of the District Court granting Petitioners' Motion for a Preliminary Injunction (App. F, *infra*, 55a), *reported at* 798 F. Supp. 463, and the unreported opinion and order of the District Court denying the Motion of Respondents AFSCME Local 1632, Ohio Council 8, AFL-CIO and AFSCME Ohio Council 8, AFL-CIO, to Dissolve the Preliminary Injunction (App. E, *infra*, 41a).

JURISDICTION

The judgment was entered on 19 December 1995. Petitioners' Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 7 March 1996 (App. A, *infra*, 1a). The time for petitioning for a writ of *certiorari* runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). On 22 May 1996, pursuant to 28 U.S.C. § 2101(c) (West 1993) and Rule 13.5 of the Rules of this Court, Justice Stevens extended the time within which to file a petition for a writ of *certiorari* to and including 2 August 1996. This petition is timely under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First and Fourteenth Amendments to the Constitution of the United States, the Civil Rights Act of 1871, 42 U.S.C. § 1983 (West 1994), and Ohio's Public Employee Collective Bargaining Law ("PECBL"), OHIO REV. CODE ANN. § 4117.09, appear in App. G, *infra*, 69a.

STATEMENT OF THE CASE

Petitioners are seven individuals representing a class of more than 1,500 present and/or former nonuniformed employees of the Respondent City of Columbus ("City") in a bargaining unit for which the exclusive bargaining representative is Respondent AFSCME Local 1632, Ohio Council 8, AFL-CIO ("Local 1632"). Petitioners, like the members of the class (collectively, "the nonmembers"), are not union members, and/or were not members when "agency fees" were seized from their pay. App. B at 3a-4a. Local 1632 is affiliated with, *inter alia*, Respondent AFSCME Ohio Council 8, AFL-CIO ("Ohio Council 8"), the American Federation of State, County and Municipal Employees, AFL-CIO ("the International"), and the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). App. B at 4a.

Pursuant to the PECBL, OHIO REV. CODE ANN. § 4117.09, Local 1632 and the City executed a collective bargaining agreement—including an agency shop clause—effective in April 1990. The City agreed to deduct for the benefit of Local 1632 "agency fees" from the wages of all nonmembers. *Id.*

Beginning in April 1990, the City seized "agency fees" from the nonmembers, and forwarded the fees to Ohio Council 8. Part of the fees were then forwarded by Ohio Council 8 to Local 1632 and the International.[1] None of the procedural protections required by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), was provided before these fee seizures began. App. F at 56a; 798 F. Supp. at 465.

After about three months of collections, AFSCME sent to the nonmembers the first of a series of notices, purportedly to fulfill its obligations under *Hudson*. These were the notices considered by the District Court. As relevant to this Petition, each of these

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[1] For ease of reference, and unless otherwise necessary for clarity, Local 1632 and Ohio Council 8 shall hereinafter be referred to as "AFSCME," or "the union."

notices claimed that the following categories of expenditures (which appeared in the following form in the notice's final incarnation) were properly chargeable to nonmembers in the City bargaining unit represented by Local 1632:

> Expenses associated with the following activities are totally chargeable:
> * * * *
> 5. The public advertising of AFSCME's positions on the negotiation, ratification, or implementation of collective bargaining **agreements**.
> 6. Lobbying for the negotiation, ratification, or implementation of **a** collective bargaining agreement.
> * * * *
> 15. The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation, or enforcement of collective bargaining **agreements** and any other litigation before agencies or in the courts which concerns bargaining unit employees which is normally conducted by an exclusive representative.

District Court Record ("R.") 78, AFSCME's Motion to Dissolve the Preliminary Injunction, and Brief in Support Thereof, Exhibit 1, pp. 4-5 (emphasis added).[2]

The nonmembers filed this civil rights class action under 42 U.S.C. § 1983 (West 1994) in the District Court on 15 March 1992. They sought a declaratory judgment; injunctive relief;

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[2] The final notice considered by the District Court further stated that:

> In light of the decision of the U.S. District Court in Reese v. City of Columbus, the International Union has treated as nonchargeable all expenses associated with lobbying for purposes other than the ratification, interpretation, implementation or enforcement of collective bargaining **agreements**.

R. 78 at 18 (emphasis added); *see also id.* at 23 (auditor's notes for Ohio Council 8—"Likewise, all lobbying expenses incurred for purposes other than the negotiation, ratification, or implementation of **a** collective bargaining agreement were treated as totally nonchargeable") (emphasis added).

nominal, punitive, and compensatory damages; and costs and attorneys' fees, on the ground that the City and Local 1632 were enforcing their "agency shop" scheme in violation of *Hudson*.[3] Simultaneously, the nonmembers successfully sought a class-wide preliminary injunction to stop all fee seizures, based upon AFSCME's first notice. R. 2, Plaintiffs' Motion for a Preliminary Injunction; App. F at 68a; 798 F. Supp. at 472.

With a second notice and recalculated fee, AFSCME moved for dissolution of the preliminary injunction on 6 October 1992. R. 36, AFSCME's Motion to Dissolve the Injunction. This motion was denied on 19 February 1993. App. E at 53a-54a. The nonmembers moved for summary judgment on 15 January 1993. They requested, *inter alia*, a final declaratory judgment that the "agency fees" seized before the District Court's preliminary injunction was entered violated the nonmembers' First-Amendment due-process rights, because AFSCME's notices and procedures were insufficient under *Hudson*, 475 U.S. 292 (1986). R. 61, Plaintiffs' Motion for Summary Judgment. That motion was granted in part and denied in part on 23 June 1993. App. D at 40a; 826 F. Supp. at 1122.

The District Court found that AFSCME and the City had failed to comply with all of "the constitutional requirements for the ... collection of agency fees" set forth in *Hudson*, 475 U.S. at 310, and its Sixth Circuit progeny, reserving certain other issues for trial to commence on 20 September 1993. App. D at 40a; 826 F. Supp. at 1122. After the parties reached a partial settlement on the eve of trial (reserving for appeal issues raised in the District Court's 23 June Opinion and Order), and after a fairness hearing required by Rule 23(e), FED. R. CIV. P., the District Court entered final judgment on 4 January 1994, "consistent with th[e] Court's prior rulings and decisions." App. C at 15a.

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[3] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343. R. 1, Plaintiffs' Verified Class Action Complaint, ¶¶ 2-3.

In its 23 June order, the District Court denied that portion of the nonmembers' summary judgment motion which sought relief from AFSCME's calculation of an "agency fee" that included its expenditures for: (1) litigation activities outside of the nonmembers' bargaining unit; (2) public relations/advertising expenditures for the negotiation, ratification, and implementation of collective bargaining agreements other than that which governs the terms and conditions of employment for the nonmembers; and (3) lobbying expenditures for the negotiation, ratification, and implementation of collective bargaining agreements other than that which governs the nonmembers' terms and conditions of employment. App. D at 37a-39a; 826 F. Supp. at 1121-22; **see also** App. E at 44a-53a. The court found that charging nonmembers for these expenditures is constitutionally permissible under the First Amendment and *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). These findings were contrary, in part, to legal determinations made by the District Court in its initial preliminary injunction decision. App. F at 64a-65a; 798 F. Supp. at 470.

With a third notice and recalculated fee, AFSCME renewed its Motion to Dissolve the Preliminary Injunction on 20 August 1993. R. 78. Petitioners opposed on the grounds that the new notice and procedures calculated the "agency fee" to include AFSCME expenditures for those activities outside of the bargaining unit as set forth above.

On 20 September 1993, the District Court dissolved the preliminary injunction. It held that "the final amended proposed fair share fee notice does comply with all applicable constitutional requirements." R. 94, Order Dissolving the Preliminary Injunction. This ruling was based in part upon the court's earlier holdings (denying in part Petitioners' summary judgment motion, App. D at 37a-38a, 826 F. Supp. at 1121, and denying AFSCME's initial motion to dissolve the preliminary injunction, App. E at 44a-53a) that it is constitutionally permissible for AFSCME to calculate the "agency fee" to include its expenditures for litigation activities outside of the bargaining unit, and public relations/ advertising and lobbying expenditures for the negotiation, ratification, and implementation of collective bargaining agreements other

than that which governs the terms and conditions of employment for the nonmembers. Final judgment was entered on 4 January 1994. R. 111, Entry of Final Judgment.

The nonmembers timely noticed their appeals from the entry dissolving the injunction on 4 October 1993, and from the Entry of Final Judgment on 27 January 1994. R. 97, Notice of Appeal; R. 112, Notice of Appeal. The appeals were consolidated upon AFSCME's motion on 4 February 1994.

In the Court of Appeals, the nonmembers challenged the District Court's dissolution of the preliminary injunction and entry of final judgment that found AFSCME's notice and procedures constitutionally adequate under *Hudson*. Specifically, they attacked the District Court's rulings that AFSCME could claim as chargeable its expenditures for: (1) litigation activities outside of the nonmembers' bargaining unit; (2) public relations/advertising expenditures for the negotiation, ratification, and implementation of collective bargaining agreements other than that which governs the terms and conditions of employment for the nonmembers; and (3) lobbying expenditures for the negotiation, ratification, and implementation of collective bargaining agreements other than that which governs the terms and conditions of employment for the nonmembers. App. B at 6a; 71 F.3d at 623.

The panel affirmed the District Court with regard to extra-unit litigation and public relations/advertising expenditures. App. B at 7a-10a; 71 F.3d at 623-25. However, the panel found that "the District Court did not expressly apply the three-prong test [in *Lehnert*] to the extra-unit lobbying expense," and that "there was a genuine issue of material fact concerning the benefit, if any, the objectors' unit received from this expenditure in deciding the summary judgment motion." *Id.* at 12a-13a; 71 F.3d at 626. The panel therefore remanded:

> for a determination of whether the lobbying expense charge benefitted the objectors' unit and if so, whether the expenditure is justified by the government's vital policy interest in labor peace and avoiding free-riders and

> whether the charge significantly added to the burdening of free speech that is inherent in the allowance of an agency shop.

App. B at 12a-13a; 71 F.3d at 626. A timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 7 March 1996, with "less than a majority of the judges having favored the suggestion." App. A at 1a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the constitutional limitations on a public employer's authority, granted by state law, to seize "agency fees" from nonunion public employees for the benefit of a mandatory collective bargaining representative. Though some of the issues presented herein were decided by this Court in *Lehnert*, that case's multiple opinions have led to confusion in the lower courts and encouraged the Court of Appeals to depart from this Court's holdings. Indeed, at least one of these issues has been specifically and unanimously decided by this Court in the context of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (holding that nonmembers may be forced to subsidize litigation only in and for their bargaining unit), a decision not even cited by the Court of Appeals.

A number of the courts of appeals have themselves suggested the need for further guidance from this Court on these questions. In *Bromley v. Michigan Education Association*, the Sixth Circuit explained that "[w]hether the objecting employee can be required to contribute to the cost of [extra-unit] litigation proved to be a difficult question for our panel in light of the Supreme Court's fractured decision in *Lehnert*." 82 F.3d 686, 696 (6th Cir. 1996). In *Pilots Against Illegal Dues v. Air Line Pilots Association ("ALPA")*, the court of appeals commented that, because the section of Justice Blackmun's opinion in *Lehnert* dealing with extra-unit litigation "was adopted by a majority of the Court, some uncertainty may remain as to whether the Constitution forbids

charging dissenting employees for extra-unit litigation." 938 F.2d 1123, 1130 (10th Cir. 1991).[4]

One Circuit Judge has explicitly solicited further guidance from this Court on these questions. In *Beckett v. Air Line Pilots Association*, Judge Silberman complained that:

> when assessments have been levied for expenditures relating to activities at another bargaining unit, it is impossible to detect in the Supreme Court cases—particularly *Lehnert*—a principled basis for distinguishing expenditures that are "germane" from those that are not.

He then appealed for guidance: "surely the Court can give us some principles on which to base our decisions." 59 F.3d 1276, 1281 (D.C. Cir. 1995) (Silberman, J., concurring dubitante).

The Court of Appeals decided the questions presented here in a way that pays insufficient heed to this Court's oft-repeated admonition that impingements upon First-Amendment rights must be narrowly tailored to serve a compelling government interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990), *citing Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (infringements on associational freedoms justified by compelling state interests must be achieved by least restrictive means); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation" must be the touchstone in the First Amendment context), *cited with approval in Hudson*, 475 U.S. at 303 n.11. In permitting the City and AFSCME to compel the nonmembers' support for AFSCME's "speech of a political nature in a public forum," *Lehnert*, 500 U.S. at 528, the Court of Appeals failed to require the constitutionally—necessary nexus between the limited license granted to Local 1632 to compel nonmembers to subsidize

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[4] The Tenth Circuit, however, did conclude from *Lehnert* "that a majority of the Supreme Court would not allow [the union] to charge [extra-unit] litigation expenses to [objecting nonmembers]." 938 F.2d at 1130.

its function as their monopoly bargaining representative and the functions performed by its affiliated labor organizations.

In so doing, the Court of Appeals disregarded the limited authority granted to public employers and labor unions to compel nonmembers' financial support of those unions, when this Court's decisions command a contrary result. For the second time,[5] the Sixth Circuit has adopted a broad chargeability rule which compels nonmembers to support union speech and political activities directly contrary to their own political beliefs and interests—ignoring this Court's mandates that such infringements be circumscribed by "precision of regulation." *Button*, 371 U.S. at 438. The Court of Appeals' decision compels nonunion employees to subsidize litigation, speech, and political activities far removed from their own bargaining unit and which may well be directly contrary to their own political and pecuniary interests.

I. THE IMPORTANT QUESTIONS PRESENTED HAVE BEEN SETTLED BY THIS COURT, BUT THE COURT SHOULD RESOLVE THE CONFUSION ENGENDERED BY ITS OWN SPLIT OPINIONS.

The mere existence of an "agency shop" "is 'a significant impingement on First Amendment rights'" of nonunion employees. *Hudson*, 475 U.S. at 301 & n.8, *quoting Ellis*, 466 U.S. at 455-56. Moreover, the government may not compel public employees to support financially a union's political and ideological activities. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977); *Lehnert*, 500 U.S. at 516. Consequently, procedures for the collection of "agency fees" must be "carefully tailored to minimize the [First Amendment] infringement." *Hudson*, 475 U.S. at 303.

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[5] *See Lehnert v. Ferris Faculty Association*, 881 F.2d 1388, 1389 (6th Cir. 1989) (2-1 decision) (Martin, J., for the majority), *aff'd in part, rev'd in part*, 500 U.S. 507 (1991); *Reese*, App. B at 3a; 71 F.3d at 621 (authored by Martin, J.).

The importance of these issues is demonstrated by the fact that at least twice in its last six terms, this Court has reaffirmed the constitutional limitations upon a government which licenses politically-active private organizations to compel financial support for some of their activities. This Court has held that requiring payment or allowing seizure of monies to finance political and ideological activities outside of a compelling state interest justifying the infringement inherent in the compelled association impermissibly violates the First-Amendment rights of free association and speech. *See Lehnert* (public-employee unions); *see also Keller v. State Bar*, 496 U.S. 1, 9-17 (1990) ("integrated" or "unified" state bars).

Further, this Court has already agreed to review—in its next term—a case involving the First-Amendment implications of a federal statutory and administrative scheme requiring handlers of certain agricultural products to fund generic advertising programs for those commodities. *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Brothers & Elliott, Inc.*, ___ U.S. ___, 116 S. Ct. 1875 (1996); *see also* Glickman's Petition for a Writ of Certiorari at 14 (case involves compelled funding of "generic advertising"). Significantly, the *Glickman* Petition asserts that "*Abood* and *Keller* furnish the most appropriate general principles for reviewing the generic advertising programs at issue here." *Id.* at 18.

This Court also has addressed the constitutional limits on the power of governments and unions under an "agency shop" in *Ellis* (under the RLA), and *Hudson* and *Abood* (in public employment). "[T]he importance of these issues" caused the Court to grant *certiorari* in these cases. *Lehnert*, 500 U.S. at 514.

Besides the 1,500 present and former nonunion City of Columbus employees represented by the Petitioners, the questions presented by this Petition are crucial to the millions of American employees whose First-Amendment freedoms are burdened by

compulsory unionism schemes.[6] As of 1996, some form of compulsory unionism was authorized or occurs for at least some classes of public employees in some twenty states and the District of Columbia. Milton L. Chappell, *Seeking a New Foundation*, 16 Government Union Review 1, 6-7, 23-28 (table) (1995). In 1995, nearly two million nonmember employees were represented by unions, with more than 53% of those in the public sector. Barry T. Hirsch and David A. Macpherson, *Union Membership and Earnings Data Book: Compilations from the Current Population Survey* (BNA), Table 7a (1996). Approximately 80% of the employees falling under the jurisdiction of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, are subject to agency shop arrangements with private employers. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions* 5 (1982).

The freedoms guaranteed by the First Amendment are "rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521 (1958). The government must "tread[ ] with sensitivity in areas freighted with First Amendment concerns," such as agency

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[6] In the wake of *Hudson*, literally tens of thousands of nonunion public employees have obtained relief for violations of the First-Amendment rights as set forth therein. *See Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 944 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258, 262 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 375 (1992) (class of 8,000 nonunion teachers required to pay agency fees); *Hohe v. Casey*, 128 F.R.D. 68, 72 (M.D. Pa. 1989) (class of 56,000 nonunion state employees), *aff'd in part, rev'd in part*, 956 F.2d 399 (3d Cir. 1992); *Damiano v. Matish*, 644 F.Supp. 1058, 1060 (W.D. Mich. 1986) (class of 200 state employees), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987); *George v. Baltimore City Public Sch.*, 117 F.R.D. 368 (D. Md. 1987) (class of more than 1,000 nonunion teachers).

Of course, the Court's disposition of this case would also be precedential in other "agency shop" contexts, including those under the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and those arising under the RLA, 45 U.S.C. § 151, *et seq.*; *Keller*, 496 U.S. at 14-17; *see also Lehnert*, 500 U.S. at 516; *Communications Workers of America v. Beck*, 487 U.S. 735, 762 (1988); *Ellis*, 466 U.S. at 443, 455-56.

shop arrangements. *Hudson*, 475 U.S. at 303 n.12. Moreover, infringements upon the exercise of First-Amendment rights must be "narrowly tailored to serve a compelling government interest." *Board of County Commissioners v. Umbehr*, ___ U.S. ___, 64 U.S.L.W. 6482, 6485 (28 June 1996). Additionally, "care must be taken not to confuse the interest of partisan organizations with governmental interests." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (*per curiam*).

Notwithstanding these admonitions, the courts below failed to tread with the requisite sensitivity on the First-Amendment rights of the nonunion City employees, determining instead that they constitutionally may be compelled to subsidize activities of the unions **already found** by this Court constitutionally to be non-chargeable to nonunion public employees. *Lehnert*, 500 U.S. at 527 (lobbying expenditures), 528 (extra-unit litigation expenditures and public relations expenditures); *cf. Ellis*, 466 U.S. at 453 (extra-unit litigation unanimously held to be nonchargeable to nonmembers under the RLA).

The panel's validation of procedures which allow government to compel nonmembers to fund a unions' nonchargeable activities promotes widespread distortion of the political and legislative processes. *Cf. Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (government has primary interest in prevention of corruption and appearance of corruption in electoral process); *see also Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, ___ U.S. ___, 64 U.S.L.W. 4663, 4664 (28 June 1996) ("'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"). "Conditioning public employment on partisan support prevents support of competing political interests." *Elrod*, 427 U.S. at 356; *cf. Umbehr*, 64 U.S.L.W. at 4687 (nonrenewal of public contracts in retaliation for protected speech violates First Amendment); *O'Hare Truck Service, Inc. v. City of Northlake*, ___ U.S. ___, 64 U.S.L.W. 4694, 4698 (28 June 1996) (same). "Given the increasingly pervasive character of government employment, ... the power to starve political opposition by commanding partisan support, financial and otherwise, may have

a significant [distorting] impact on the formation and expression of political beliefs." *Branti v. Finkel*, 445 U.S. 507, 513 n.8 (1980). For all of these far-reaching and important reasons, the Petition should be granted.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISIONS, AS WELL AS THOSE OF A NUMBER OF COURTS OF APPEALS AND AT LEAST TWO STATE SUPREME COURTS.

The court below was not the first appellate court to address the issues presented here in the wake of this Court's decision in *Lehnert*, 500 U.S. 507 (1991). It was, however, **the first and only appellate court** to hold that *Lehnert* permits public employers and unions to force nonmembers to subsidize some of the activities in question.[7]

The panel concluded that, in *Lehnert*, "a majority [of this Court] approved of charges for pooled expenses like those in this case." App. B at 8a; 71 F.3d at 624. The panel conceded that four Justices specifically found extra-unit litigation expenses to be nonchargeable. The panel constructed a majority to the contrary by first agreeing with Justice Marshall's lone dissent that "the issue of extra-unit litigation costs was not properly before the Court."

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[7] It appears that not all of the judges of the Sixth Circuit agree with the panel's decision below. After the panel's decision and the denial of the Petition for Rehearing and Suggestion of Rehearing *En Banc* in this case, another panel issued its decision in *Bromley v. Michigan Education Association*, 82 F.3d 686 (6th Cir. 1996). There, the court commented that the chargeability of extra-unit litigation expenditures was "a difficult question for our panel in light of" this Court's decision in *Lehnert*. *Bromley* held extra-unit litigation chargeable only because *Reese*, 71 F.3d 619 (6th Cir. 1995), was "binding under our circuit precedent rule." *Id.* at 695-96. *See LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1105 (6th Cir. 1995) (circuit rule that one panel may not overrule the decision of another panel), *reh. denied*. Moreover, the order denying rehearing *en banc* in this case implies that at least one judge requested rehearing *en banc*. *See* App. A, 1a-2a.

Id., *citing* 500 U.S. at 543 (Marshall, J., concurring in part and dissenting in part).[8] The panel then cited the majority's agreement on the general test for "pooled expenses." However, the panel **ignored Justice Scalia's statement** (joined by three other Justices), citing with approval *Ellis*' treatment of extra-unit litigation expenditures as nonchargeable. 500 U.S. at 554.

Ellis held that **only** the costs of a union's litigation to enforce and administer **the bargaining unit's** agreement were chargeable. "The expenses of litigation **not having such a connection with the bargaining unit** are not to be charged to objecting employees." 466 U.S. at 453 (emphasis added). *Ellis* specifically, unambiguously, and **unanimously** held that:

> objecting employees need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact; of litigation seeking to protect the rights of airline employees **generally** during bankruptcy proceedings; or of defending suits alleging violations of the non-discrimination requirements of Title VII of the Civil Rights Act of 1964.

466 U.S. at 453 (emphasis added). These rulings were reiterated by *Lehnert*, and cannot be squared with the panel's ruling in the instant case. The panel misapplied the general test to draw a conclusion contrary to this Court's specific application of the same test. That leaves the court below, under the panel's rule of law, espousing the dubious but clearly implicit proposition that *Lehnert* overruled *Ellis sub silentio*, a curious circumstance indeed, since every Justice (save Justice Marshall) declared that *Ellis* should be followed in the public sector. 500 U.S. at 518-19, 528 (Blackmun, J.); *id.* at 554-55 (Scalia, J.). Oddly, but revealingly, one searches

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[8] This proposition seems to have escaped every other Justice. To the contrary, the Court applies the same rule to the costs of an activity and the costs of reporting about it. *Lehnert*, 500 U.S. at 528; *Ellis*, 466 U.S. at 451 & n.11; *see also Crawford v. Air Line Pilots Association*, 992 F.2d 1295, 1311 (4th Cir.) (*en banc*) (Russell, J., dissenting), *cert. denied*, ___ U.S. ___, 114 S. Ct. 195 (1993).

the panel's opinion in vain for **any** reference to this Court's contrary decision in *Ellis*.

Of necessity, this curious—albeit quiet—conclusion requires the assumption that no member of this Court realized that Justices Marshall, Scalia, and the three other Justices who joined the latter's (though not the former's) opinion constituted a majority as to the chargeability of extra-unit litigation.[9] This conclusion suggests that Justice Marshall not only did not know that his opinion constituted the majority on this issue, but that he operated under the misconception that his was the minority position. It also suggests that the other four Justices who *sub silentio* agreed with Justice Marshall kept their agreement with him a secret!

The panel's conclusion is contrary to common-sense and Justice Marshall's opinion. **Four times** he stated that he **dissented** from "**the Court's decision** that the costs of articles printed in [the union]'s employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (Marshall, J., dissenting in part); *accord*, *id.* at 534 ("**the Court's disposition** of these **three** disputed charges," *i.e.*, lobbying, public relations, and extra-unit litigation), 545 ("**the Court's unreasonable conclusion** that these [costs for reporting on extra-unit litigation] are not chargeable"), 550 ("**the Court's conclusion** that the **three** types

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[9] Justice Kennedy joined the part of Justice Scalia's opinion which implicitly concurred in the plurality's holding that all extra-unit litigation and lobbying expenditures are nonchargeable. *See Lehnert*, 500 U.S. at 562 (Kennedy, J., concurring in the judgment in part and dissenting in part). However, Justice Kennedy also suggested that extra-unit litigation should be chargeable under Justice Scalia's view that the costs of "on-call services for use in the bargaining process," *id.* (Scalia, J., concurring in part), are chargeable even though not provided to the nonmembers' bargaining unit. *See id.* at 563 (Kennedy, J.). On the other hand, Justice Scalia indicated neither that he disagreed with the plurality nor that he agreed with Justice Kennedy as to extra-unit litigation. Moreover, Justice Scalia omitted litigation from examples of "collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance)," *id.*, at 561 (Scalia, J.), which he felt should be chargeable on an "on-call" basis.

of charges discussed above may not be included in the service fees") (emphasis added).

The panel's conclusion also misapprehends what Justice Scalia actually did. Justice Scalia specifically said where he disagreed with the principal opinion and criticized it for "**expand[ing]** and obscur[ing] the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers." 500 U.S. at 550 (emphasis added). Notably, Justice Scalia never criticized the principal opinion for inappropriately **limiting** chargeable categories of union expenses. Neither did he even hint that he disagreed with the finding that extra-unit litigation is nonchargeable. *See Lehnert*, 500 U.S. at 550-60; *see also Crawford*, 992 F.2d at 1316 (Russell, J., dissenting) ("While the union's suggestion [that Justice Scalia would allow charges for extra-unit litigation] is creative, it is not persuasive").

To the contrary, Justice Scalia and at least two other Justices implicitly concurred with the plurality's comments concerning extra-unit litigation, by quoting *Ellis*' ruling that nonmembers may be charged

> only ... for litigation "incident to negotiating and administering **the contract** or to settling grievances and disputes **arising in the bargaining unit**," and "other litigation ... **that concerns bargaining unit employees** and is normally conducted by the exclusive representative."

Id. at 555 (emphasis added) (quoting 466 U.S. at 453). He then concluded that "there is good reason to treat [*Ellis* and other private-sector cases] **as merely reflecting the constitutional rule**." 500 U.S. at 555 (emphasis added).

Recognizing that he was a minority of one, only Justice Marshall specifically dissented on this issue. He dissented from "**the Court's decision** that the costs of articles printed in MEA's employee journal about union litigation outside petitioners' bargaining unit are not chargeable." *Id.* at 534 (Marshall, J.,

dissenting in part) (emphasis added). Whatever the interpretive test applied to fragmented Supreme Court decisions, lower federal courts are surely obliged to give credence to each Justice's plain meaning and understanding of his or her own decision and position relative to other Justices. Such an analysis leads ineluctably to the conclusion that the panel misapplied *Lehnert*. For this reason alone, the Petition should be granted.

A. There Is A Split In The Circuits—The Court Below Stands Alone Among Appellate Courts Addressing Extra-Unit Litigation.

In the wake of *Lehnert*, the chargeability of extra-unit litigation expenditures has been considered by other federal circuits and state supreme courts. Each one reached a conclusion contrary to that reached by the Sixth Circuit in this case. These conflicts provide additional reasons for granting the Petition here.

In *Pilots Against Illegal Dues v. Air Line Pilots Association*, 938 F.2d 1123, 1129-30 (10th Cir. 1991), the Tenth Circuit was the first circuit to consider, post-*Lehnert*, whether a labor union constitutionally may charge nonmembers for extra-unit litigation expenditures.

Citing *Ellis*, 466 U.S. at 453, the Tenth Circuit held that "ALPA may not charge objecting United pilots for expenses incurred in litigation on behalf of the Continental bargaining unit." *Pilots Against Illegal Dues*, 938 F.2d at 1129-30. In so doing, it expressly rejected the notion that *Ellis* did not control: "At bottom, [the union's] argument boils down to a contention that the Supreme Court did not mean what it said in *Ellis*. We think the Court meant what it said." 938 F.2d at 1130.

The Tenth Circuit did not rely upon *Ellis* alone, specifically noting that "[t]his reading of *Ellis* is **bolstered by** the recent *Lehnert* decision." *Id.* at 1130 (emphasis added). The court said that the "section of Justice Blackmun's opinion [addressing extra-unit litigation] was not adopted by a majority of the Court," and

that therefore, "some uncertainty may remain as to whether the Constitution forbids charging dissenting employees for extra-unit litigation." *Id.* Nonetheless, based on its reading of Justice Scalia's opinion in *Lehnert*, the Tenth Circuit concluded "that a majority of the Supreme Court would not allow ALPA to charge [its] litigation expenses [outside the United bargaining unit] to the plaintiffs." *Id.* at 1130 n.4. The court therefore held that extra-unit litigation is nonchargeable under the RLA "in order to relieve doubts concerning the statute's constitutionality." *Id.* at 1130.

The chargeability of extra-unit litigation also was raised in *Crawford*, 992 F.2d at 1316, where five of twelve judges of the *en banc* Fourth Circuit vigorously dissented from the assessment that the issue was not properly preserved for review.[10] That minority then went on to read *Lehnert* as barring unions from charging for the extra-unit litigation expenses validated by the Sixth Circuit in this case. *Crawford*, 992 F.2d at 1303-18 (Russell, J., dissenting).

The five-judge minority in *Crawford*—every judge reaching the issue—had no doubt that this Court's decisions hold extra-unit litigation expenditures to be nonchargeable. "In *Ellis* and *Lehnert* the Supreme Court, in positive, clear-cut terms, declared as bluntly as it could that expenses for litigation outside of a dissenter's unit ..., were not chargeable against the dissenter." 992 F.2d at 1304 (citations omitted); *see id.* at 1316 ("Both *Ellis* and *Lehnert* establish ... an unqualified rule that charges for extra-unit litigation expenses are improper"). *See also Beckett v. ALPA*, 59 F.3d at 1281 (Silberman, J., concurring dubitante).[11]

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[10] The panel majority concluded that the issue of extra-unit litigation "simply has not been properly presented and preserved below, and therefore we express no view about it." *Crawford*, 992 F.2d at 1295 (plurality opinion); *see id.* at 1302-03 (Wilkinson, J., concurring).

[11] While Judge Silberman questioned the "Supreme Court's unique perception of litigation that leads it to describe that process as 'political,'" he nonetheless recognized that this Court "held that nonmembers cannot be charged for . . . litigation expenses not directly associated with their

(continued...)

Similarly, the Supreme Courts of both Wisconsin and Indiana have specifically rejected the notion that nonmembers in one bargaining unit can be compelled to subsidize litigation activities in other bargaining units. *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 388 (Wis. 1992); *Albro v. Indianapolis Education Association*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Education Association v. Aldrich*, 594 N.E.2d 781 (Ind. 1992).[12]

While stating that "there is no majority decision on this issue in *Lehnert*," the Wisconsin Supreme Court found "Justice Blackmun's plurality opinion persuasive." Moreover, it "inferred from Justice Scalia's discussion of *Ellis* and from other early fair-share cases that a majority of the Court would find extra-unit litigation expenses nonchargeable." The court therefore held that "[e]xtra-unit litigation fails the first aspect of the *Lehnert* test—it is not germane to the collective bargaining activity of the local union." *Browne*, 485 N.W.2d at 388.

Likewise, the Supreme Court of Indiana specifically rejected the notion that Justice Scalia's opinion in *Lehnert* somehow validated charging for extra-unit litigation:

> Justice Scalia's concurring and dissenting opinion neither constitutes the opinion of the Court on this issue nor allows nonunion members to be charged for extra-unit litigation. In any event, again the analysis in Justice Blackmun's plurality opinion is persuasive. We adopt that opinion, and the judgment of the Court in *Lehnert*,

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[11] (...continued)
collective bargaining unit." *Beckett*, 59 F.3d at 1281, *citing*, *inter alia*, *Lehnert*, 500 U.S. at 528 (plurality opinion), 555 (Scalia, J., concurring).

[12] The Indiana Supreme Court adopted in whole the decision of the Indiana Court of Appeals, Second Division, in *Albro*. Hence, all references to the Supreme Court's decision actually are to the opinion of the Court of Appeals.

> and hold that extra-unit litigation expenses are *not* chargeable fair share fee expenses.

Albro, 585 N.E.2d at 673 (original emphasis).

Thus, one circuit, a substantial minority of judges in another circuit (**all** of the judges reaching the issue), and two state supreme courts have concluded that, under *Lehnert*, nonmembers may not be forced to subsidize litigation activities outside of their bargaining unit. Revealingly, the Sixth Circuit failed to in any way discuss or even cite these determinations, directly contrary to its own conclusion.[13] This conflict among the courts alone is sufficient reason for granting the Petition.

B. The Court Of Appeals' Decision Is Contrary To *Lehnert* With Regard To Extra-Unit Public Relations/Advertising Expenditures, And Conflicts With Other Appellate Courts Addressing This Issue.

Lehnert's principal opinion "disagree[d]" with the Sixth Circuit's earlier decision that "the union constitutionally could charge [nonmembers] for ... public relations expenditures" "'designed to enhance the reputation of the teaching profession.'" *Lehnert*, 500 U.S. at 528, quoting 881 F.2d at 1394; *see also id.* at 559 (Scalia, J., concurring) (holding **all** public relations activities nonchargeable).[14] Nonetheless, the panel here held that

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[13] The District Court at least conceded that it was making determinations contrary to all existing authority. App. E at 44a-50a; *see also* App. D at 37a-38a; 826 F. Supp. at 1121.

[14] The issues presented here now have been decided by the Sixth Circuit for a second time. *See Lehnert v. Ferris Faculty Association*, 881 F.2d 1388 (6th Cir. 1989) (2-1 decision) (holding these categories to be chargeable), *rev'd in pertinent part*, 500 U.S. at 520-22, 528. In both cases, Judge Martin authored the Sixth Circuit's decision. For a second time, his views on these issues are presented to this Court for review.

such activities are chargeable across bargaining unit lines, relying on an analogy to *Lehnert*'s holding that preparations for an illegal strike are chargeable. *Id.* at 530-31.[15] The panel thus ignored this Court's discussion of the specific category of expenditures at issue, and the analogy the Court drew between public relations and lobbying expenditures: "Like the challenged lobbying conduct, the public relations activities at issue here entailed speech of a political nature in a public forum." *Id.* at 528.

Lehnert rejected the Sixth Circuit's "comparison of these public relations expenses to the costs of union social activities held in *Ellis* to be chargeable to dissenters." That analogy failed because the communicative content of social activities was derived "solely" from the union's participation in them. 500 U.S. at 529; *see also Ellis*, 466 U.S. at 456. The panel's analogy also fails because public relations activities inherently are communicative—"speech of a political nature in a public forum." 500 U.S. at 528. Like social activities, strike preparation activities, such as "the creation ... of a ... 'strike headquarters,'" *id.* at 530-31, are not inherently communicative. Rather, they are "'within the range of reasonable **bargaining tools** available to a public sector union during contract negotiations,'" and "appurtenant to collective-bargaining negotiations." *Id.* at 531-32, quoting 881 F.2d at 1394 (emphasis added); *see also Crawford*, 992 F.2d at 1314 (Russell, J., dissenting) ("Whether First Amendment rights are implicated is driven ... by whether the activity has 'communicative content' outside of the union").

Moreover, the strike-preparation expenses considered in *Lehnert* were for a strike in support of the collective-bargaining negotiations in the nonmembers' own bargaining unit, and thus necessarily were **"to the direct benefit of members of the dissenters' unit."** 500 U.S. at 532 (emphasis added). In contrast,

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[15] The panel erroneously said that "*Lehnert* did not concern the constitutionality of charges for advertising expenses." App. B at 10a; 71 F.3d at 625. Advertising by definition is paid public relations, addressed by this Court in *Lehnert*, 500 U.S. at 528-29.

Lehnert found the challenged public relations expenditures to be nonchargeable, because "public speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions" in the nonmembers' bargaining unit. *See id.* at 528.

Public relations and advertising concerning collective bargaining in other bargaining units are no more germane to the nonmembers' bargaining than are "public speech in support of the teaching profession generally." *Id.* at 528. And indeed, because they impact upon the nonmembers solely as citizens and taxpayers, but decidedly **not** as employees in their own bargaining unit, their First-Amendment significance is direct and tangible.

Public relations activities outside of the bargaining unit are nonchargeable under *Lehnert*, because they cannot survive scrutiny under *Lehnert*'s requirement that expenditures "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519; *see Albro*, 585 N.E.2d at 672-73. Public relations on behalf of the nonmembers' own bargaining unit is arguably chargeable, because it affects the nonmember as an **employee** in **his or her** unit. ***But see*** 500 U.S. at 559 (Scalia, J., concurring) (holding all public relations activities nonchargeable). Under those circumstances, while public relations activity is by its very nature compelled speech, it also bears a closer relationship to the union's role as exclusive bargaining representative, addressing the negotiation and enforcement of the collective bargaining agreement governing the nonmember's terms and conditions of employment.

On the other hand, advertising expenditures for other bargaining units are too attenuated in their relationship to bargaining on the nonmember's behalf to justify the additional burden upon his or her free speech rights. They affect the nonmember primarily as a **citizen, taxpayer, and consumer of scarce public resources**. Forced subsidization of extra-unit public relations activities are both unrelated to the nonmember's employment relations, and have a direct, tangible, and adverse impact upon the nonmember's constitutional interests in expressing (or refraining from expression

or supporting the expression of) political and ideological opinions as a taxpayer and/or consumer of scarce public resources.

In this way, these expenditures are like the "informational picketing, media exposure, signs, posters and buttons" found to be nonchargeable in *Lehnert*, 500 U.S. at 528-29. They are more akin to the union organizing activities found to be nonchargeable under the RLA in *Ellis*:

> [T]he free-rider rationale does not extend this far. The image of the smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money, is completely out of place when it comes to the union's overall organizing efforts. If one accepts that what is good for the union is good for the employees, a proposition petitioners would strenuously deny, then it may be that employees will ultimately ride for free on the union's organizing efforts. But the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee. Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any free-rider problem here is roughly comparable to that resulting from union contributions to pro-labor political candidates.

Ellis, 466 U.S. at 452-53; *see also id.*, n.13 ("it would be perverse to read [the RLA] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members").

Comparably, extra-unit public relations/advertising expenditures are "not directed at that [nonmember]. [It] is spent [for] people who are not union members, and only in the most distant way works to the benefit of those already paying dues." *Id.* at 453. Indeed, because such expenditures outside of the unit have

tangible impact upon the nonmember as citizen, taxpayer, and consumer of scarce public resources—but no impact upon the nonmember as an employee in his or her bargaining unit—they have the same constitutionally antagonistic relationship as expenditures for union organizing activities.

As with extra-unit litigation, the panel's ruling concerning public relations/advertising activities conflicts with the decisions of other appellate courts. In *Albro*, the Indiana Supreme Court held that all public relations activities, as "speech activities that are directed to the public at large," are nonchargeable. 585 N.E.2d at 672-73.

Similarly, in *Crawford*, all judges of the Fourth Circuit who discussed the chargeability of extra-unit public relations activities concluded that such activities are nonchargeable under *Lehnert*.

> The only activity with communicative content directed outside the union that the Court found could be charged against dissenters was preparation for a strike in the dissenters' unit because it was "within the range of reasonable bargaining tools available to a ... union during contract negotiations."

992 F.2d at 1315 (Russell, J., dissenting), *citing Lehnert*, 500 U.S. at 530-31. The Court should grant the petition to resolve the conflicts among the appellate courts on this issue, too.

C. The Court Of Appeals' Decision Is Contrary To *Lehnert* With Regard To Extra-Unit Lobbying Expenditures, And Conflicts With Other Appellate Courts Addressing This Issue.

Expenses for lobbying "to obtain ratification or implementation of a collective bargaining agreement" are chargeable to objecting nonmembers under *Lehnert*'s principal opinion only if they "concern legislative ratification of, or fiscal appropriations for, **their** collective bargaining agreement." 500 U.S. at 519

(emphasis added). This approval was grudging, justified only because of the "dual roles of government as employer and policy-maker." *Id.* at 520. However, the panel below divined a Supreme Court majority for the proposition that such lobbying is chargeable without regard to the unit involved, so long as it "benefitted the objectors' unit," again utilizing Justice Marshall's solitary dissent. App. B at 11a-12a; 71 F.3d at 625.

A clear majority of this Court disapproved of the chargeability of such expenditures. In addition to the principal opinion's explicit holding, Justice Scalia's test for chargeability compels that conclusion. Justice Scalia held that:

> a charge must *at least* be incurred in performance of the union's statutory duties.... [A] union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

Lehnert, 500 U.S. at 558 (original emphasis). He concluded that union "costs in providing collective-bargaining services ... to its affiliates nationwide" met that test, because having "on-call services for use in the bargaining process" available to the non-members' bargaining unit when needed is "a tangible benefit relating to the union's performance of its representational duties." *Id.* at 561. However, Justice Scalia did **not** include lobbying for ratification or implementation of a collective bargaining agreement as an example of the "collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance)," *id.* at 561, which can be charged on an "on-call" basis.

Justice Scalia agreed with Justice Blackmun "that the challenged lobbying expenses are nonchargeable," because they "are no part of **this** collective bargaining process." *Id.* at 560 (emphasis added). The bargaining process to which Justice Scalia referred was that defined by state law, MICH. COMP. LAWS § 423.214 (*quoted at* 500 U.S. at 559), as "the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder." Justice Scalia emphasized that, under this definition, "the union's duties extend *only* to negotiating an agreement and resolving disputes under it." 500 U.S. at 559 n.3 (original emphasis). Lobbying for the ratification or implementation of a collective bargaining agreement, even in the nonmember's own unit, is neither "negotiating an agreement" nor "resolving disputes under it."[16]

Ohio law is virtually indistinguishable from the statutory provision considered by Justice Scalia. The Ohio Revised Code similarly defines "to bargain collectively" as:

> to perform the mutual obligation of the public employer, by its representatives, and the representative of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement.

§ 4117.01(G). As in *Lehnert*, the lobbying and public relations here at issue, for the ratification or implementation of a collective bargaining agreement, even in a nonmember's own unit, are neither "negotiat[ion]" nor "resolv[ing] questions arising under the agreement."

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[16] The lobbying expenditures challenged in *Lehnert* included support of "millages," *i.e.*, local property taxes, to fund elementary, intermediate, and high schools. *See Lehnert v. Ferris Faculty Association*, 643 F. Supp. 1306, 1313 (W.D. Mich. 1986). Although millages were unrelated to bargaining in the *Lehnert* plaintiffs' unit, which was in higher education, *see id.* at 1308, they could easily be said to be necessary to the implementation of collective bargaining agreements in those other bargaining units. 881 F.2d at 1392. Justice Scalia, nonetheless, agreed that they were not chargeable.

That this was Justice Scalia's view is confirmed by another part of his opinion. Lobbying clearly is a political activity. *See Machinists v. Street*, 367 U.S. 740, 769 n.17 (1961). Justice Scalia restated the holding of "*Street* that expenses relating to political and ideological activities could not be charged to nonmembers," because they were not "'costs of negotiating and administering collective agreements.'" *Lehnert*, 500 U.S. at 554, quoting *Street*, 367 U.S. at 764. As the District Court recognized in *Lehnert*, 643 F. Supp. at 1323 (emphasis added), *Street* **negatively** "settled the question whether political or ideological expenditures can **ever** be chargeable to an objecting member of a private sector bargaining unit." Yet Justice Scalia concluded that "there is good reason to treat [*Street* and other private-sector cases] **as merely reflecting the constitutional rule**." *Lehnert*, 500 U.S. at 555 (Scalia, J., concurring in part) (emphasis added). It follows that Justice Scalia viewed political and ideological activity, including lobbying, as **never** part of the statutory bargaining process, and therefore, **never** chargeable.

Other courts ruling in the wake of *Lehnert* have agreed that no extra-unit lobbying is chargeable to nonmembers. *See Albro*, 585 N.E.2d at 671-72; *see also Beckett*, 59 F.3d at 1280-81 (Silberman, J., concurring) ("lobbying activities" are not chargeable under *Lehnert*); *cf. Beck v. Communications Workers of America*, 776 F.2d 1187, 1210-11 & n.31 (4th Cir. 1985) (holding lobbying nonchargeable in private-sector case), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988); *Schreier v. Beverly California Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995) (same), *citing Lehnert*; *cf. Smith v. Regents*, 4 Cal. 4th 843, 865, 844 P.2d 500, 515-16 (1993) (*en banc*) (authority to force subsidization of lobbying activities under *Lehnert* extends only to "those matters that are **strictly necessary** to further the interest that justified the requirement of support") (emphasis added).

As with extra-unit litigation and public relations/advertising expenditures, *certiorari* should be granted to resolve this stark and irreconcilable conflict between the Sixth Circuit Court of Appeals and other appellate courts addressing expenditures for extra-unit lobbying. These conflicts—occasioned by the decision of the Sixth

Circuit in this case—can be resolved only by a clear pronouncement by this Court as to the appropriate standard of chargeability of a union's expenditure of funds pursuant to its duties as the nonmember's monopoly bargaining representative.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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August 1996

APPENDICES

APPENDIX A

ORDER OF THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

March 7, 1996

Nos. 93-4112/94-3108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD W. REESE, ET AL.,	)	**[Filed**
	)	**March 7 1996**
Plaintiffs-Appellants,	)	**LEONARD GREEN,**
	)	**Clerk]**
v.	)	ORDER
CITY OF COLUMBUS, ET AL.,	)	
Defendants-Appellants.	)	

BEFORE: MARTIN, GUY, and DAUGHTREY, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered

upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX B

OPINION AND ORDER OF THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

December 19, 1995

[71 F.3d 619]

Richard W. REESE; George R. Jordan; Richard D. Kaufman; Betty Slater; Larry L. Wygle; Marion R. Cramblit; Timothy Wanner, on behalf of themselves and the class that they represent, Plaintiffs-Appellants,

v.

CITY OF COLUMBUS; Gregory Lashutka, Mayor; Local 1632; Ohio Council 8; American Federation of State, County and Municipal Employees, Defendants-Appellees.

Nos. 93-4112, 94-3108.

United States Court of Appeals,
Sixth Circuit.

Argued Aug. 1, 1995.

Decided Dec. 19, 1995.

* * * *

[621]Before: MARTIN, GUY, and DAUGHTREY, Circuit Judges.

BOYCE F. MARTIN, JR., Circuit Judge.

This case requires us again to address the issue of whether unions may collect a fair share fee to pay for so-called "extra-unit"[1] collective bargaining-related litigation, lobbying and advertising expenses from nonunion employees who, pursuant to Ohio law, belong to a collective bargaining unit represented exclusively by the unions. The City of Columbus deducts the fair share fee from the paychecks of nonunion city employees and pays it to the defendant unions. Claiming that their First, Fifth and Fourteenth Amendment

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[1] The unions charged the objecting employees a fee for on-call litigation service and for lobbying and advertising expenses related to collective bargaining. Some of this fee also benefitted other local unions. The objectors call expenses *related to* the negotiation, ratification or implementation of collective bargaining agreements, but which were not incurred *solely* in connection with the collective bargaining agreement between their Local 1632 and the City "extra-unit" or "indirect" expenses.

rights have been violated by the "seizure" of the fair share fees and by the unions' use of these fees to pay for allegedly non-chargeable activities, the objecting nonunion employees appeal the district court's denial of their motion for summary judgment on the issue of whether extra-unit litigation, lobbying and advertising expenses are chargeable to them. *Reese v. City of Columbus*, 826 F.Supp. 1115 (S.D.Ohio 1993). They also appeal the district court's decision to dissolve its preliminary injunction restraining the collection of these fees. *J.A.* at 586 (Order of September 22, 1993).

The objecting employees' collective bargaining unit is represented exclusively by Defendants Local 1632, its national affiliate, the American Federation of State, County and Municipal Employees International and its state affiliate, Ohio Council 8. For purposes of deciding the summary judgment motion, the district court determined that Ohio Council 8 provides legal services to all affiliated local unions on an as-needed basis, and employs a staff of lawyers to handle such local union matters as grievance handling, enforcement of collective bargaining agreements, and negotiation of collective bargaining agreements. The district court also concluded that the national union provides services to the state and local unions, including advertising the national union's positions on negotiation, ratification and implementation **[622]**of collective bargaining agreements. Local 1632 has no professional or permanent staff.

Ohio law permits fair share fees to be collected from nonunion city employees for expenses related to the unions' costs of negotiating, ratifying, enforcing and administering the collective bargaining agreement between the unions and the City. Ohio Rev.Code Ann. § 4117.09(C) (Baldwin 1993). Prior to the collection of fees, the unions must give written notice of chargeable and nonchargeable expenses, and other procedural requirements must be met. Approximately 1500 non-union City employees pay the fair share fee.

On March 15, 1992, the objecting employees filed suit alleging that the defendants had violated their "First-Amendment due process rights" by failing to provide them with a proper notice regarding the collection of fair share fees. Because of constitutional inadequacies

with the required financial disclosure, the district court ordered a preliminary injunction restraining the City from collecting the fees and subsequently certified the class. The unions issued a second notice and recalculated fee, but due to remaining inadequacies the unions' motion to dissolve the preliminary injunction was denied.

On January 15, 1993, the objecting employees moved for summary judgment seeking a final declaratory judgment that the fair share fees collected between June 1990 and May 1992 were collected in violation of their constitutional rights because the unions' notices and procedures were constitutionally insufficient. On June 23, the district court granted in part and denied in part the motion. Relevant to this appeal, the district court held that it was constitutionally permissible under *Lehnert v. Ferris Faculty Association*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991), for the unions to assess a fee for collective bargaining agreement-related litigation, lobbying and advertising expenses even though the fee also supported litigation, lobbying and advertising taking place outside of the objectors' own collective bargaining unit. On September 22, the district court granted the unions' renewed motion to dissolve the preliminary injunction, finding that the final amended proposed fair share fee notice complied with all applicable constitutional requirements. Certain issues were reserved for trial. The parties then reached a partial settlement agreeing to preserve three issues for appeal. Pursuant to the agreement, the objecting employees now appeal the chargeability of the "extra-unit" litigation, advertising and lobbying expenses.

We review a district court's decision dissolving a preliminary injunction for abuse of discretion, but we review *de novo* where the dissolution is based upon a legal premise. *Tyson Foods, Inc. v. McReynolds*, 865 F.2d 99, 100 (6th Cir.1989). On February 19, 1993, the district court denied the unions' motion to dissolve the preliminary injunction because it believed that the objectors would

likely succeed[2] on two of the legal issues that had yet to be resolved—the chargeability of extra-unit advertising, and lobbying expenses.[3] On September 22, however, it dissolved the injunction in a summary order, thereby implicitly deciding that the objectors had not shown a substantial likelihood of success regarding the chargeability of the advertising and lobbying expenses. The district court's decision to dissolve the injunction was based on the legal premise that the lobbying and advertising expenses were chargeable.

As to the denial of the objectors' motion for summary judgment, we also review for abuse of discretion. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. [623]880, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988). The district court, by denying in part the objectors' motion for summary judgment, believed that the objectors were not entitled to judgment as a matter of law, and that genuine issues of material fact remained for trial.

The objecting employees rely on the Supreme Court case of *Lehnert v. Ferris Faculty Assoc.*, as their primary authority for asserting that the district court erred in concluding that litigation, lobbying and advertising expenses were chargeable even though the fees benefitted other collective bargaining units. 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (plurality opinion). The unions also rely on *Lehnert* and argue that general legal principles, as well as the views of the majority in *Lehnert*, require this Court

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[2] A preliminary injunction may be issued only if a legal remedy would be inadequate. The district court weighs four factors in deciding whether to issue a preliminary injunction: 1) whether plaintiffs have shown a substantial likelihood of success on the merits, 2) whether the plaintiffs have shown irreparable injury; 3) whether the preliminary injunction would cause substantial harm to others; 4) and whether the public interest would be served by the issuance of the preliminary injunction. *NAACP v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir.1989).

[3] On February 19, 1993, the district court determined that *Lehnert* would permit the charge for the extra-unit litigation expenses involved, and therefore the objectors had not shown a substantial likelihood of success on this issue.

to affirm the district court's determination that the charges for the "extra-unit" expenses are not unconstitutional.

Lehnert established a three-part test for determining whether mandatory fair share fees infringe upon a dissenting employee's First Amendment rights. 500 U.S. at 519, 111 S.Ct. at 1959 (J. Blackmun delivering the opinion of the Court as to Part II with Rehnquist, C.J., White, Stevens, and Marshall, JJ. concurring). A mandatory assessment is constitutional if it is (1) "germane to collective bargaining"; (2) "justified by the government's vital policy interest in labor peace and avoiding 'free-riders,' "; and, (3) "does not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* Justices Scalia, O'Connor, Souter and Kennedy, however, supported a "statutory duties" test, and would permit the unions to compel fees only for the "costs of performing the union's statutory duties as exclusive bargaining agent." 500 U.S. at 550, 111 S.Ct. at 1975. Unfortunately, the 5-4 decision in favor of the three-prong test is one of the clearer aspects of this opinion. We now turn to examine whether the district court correctly applied *Lehnert* in determining that each of the "extra-unit" expenses were chargeable to the objecting employees.

Chargeability of Extra-Unit Litigation Costs. The district court found that the fair share fee included a litigation expense charge paid to Ohio Council 8 to provide on-call legal services related to collective bargaining to all local units, including Local 1632.

> The record shows that the litigation expenses of Ohio Council 8 are directly related to grievance handling, the enforcement of the collective bargaining agreement and negotiating collective bargaining agreements ... In effect, the locals have pooled their resources at the council level in order to obtain legal services when needed ... the Court finds that defendants may properly include a pro rata share of Ohio Council 8's chargeable legal expenses as part of its [fair share] fee.

Reese, 826 F.Supp. at 1120. The district court concluded that summary judgment was not warranted because the unions had shown

that the "bulk" of the litigation services provided by Ohio Council 8 were related to grievance handling and enforcement of collective bargaining agreements, and therefore were collective bargaining agreement-related litigation services available to the objecting employees' unit. The district court did not abuse its discretion in determining that a disputed issue of material fact existed on this point.

Neither did the district court abuse its discretion in dissolving the injunction restraining the fee assessment for the extra-unit litigation charge. Although originally concluding that this charge was unconstitutional, 798 F.Supp. at 470, the district court later reversed its view. *J.A.* at 437, 439 (Order of February 19, 1993). We agree with the court's ultimate determination that the objectors did not enjoy a substantial likelihood of success in their challenge of this charge based on its conclusion that a mandatory fair share fee charged for pooled litigation services is constitutional under *Lehnert*. In deciding the "substantial likelihood of success" prong of the preliminary injunction inquiry, the district court was faced with the difficult task of interpreting *Lehnert*, which did not have a holding on this precise issue. Justice Marshall correctly observed that the issue of chargeability of *extra-unit* costs was not properly before the Court: "The opinion's discussion of extra-unit litigation costs **[624]**is no more than dicta since, as far as appears from the record before us, no such costs are at issue in this case." 500 U.S. at 544, 111 S.Ct. at 1972. Costs related to the *reporting* on litigation were at issue in *Lehnert*. However, we believe *Lehnert* does control the issue of the chargeability of pooled litigation services because a majority approved of charges for pooled expenses like those in this case.

Despite the fact that the issue of *extra-unit* litigation costs was not properly before the Court, four Supreme Court Justices agreed that extra-unit litigation costs were not chargeable if they were "unrelated to an objecting employees' unit." *Lehnert*, 500 U.S. at 528, 111 S.Ct. at 1964 (J. Blackmun, Rehnquist, White and Stevens concurring in the last paragraph of Part IV.B). A majority in *Lehnert*, however, approved of charges for pooled expense arrangements. *Lehnert*, 500 U.S. at 522, 111 S.Ct. at 1961 (J. Blackmun

delivering the majority opinion as to Para. III.B.). Regarding the constitutionality of charges for pooled expenses, the majority in *Lehnert stated*,

> We ... conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit.... There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.

Id. at 524, 111 S.Ct. at 1961. Based on this holding and the district court's determination that the objecting employees in this case benefitted from the pooling arrangement for litigation services, these services were not "unrelated" to the objectors' unit, and therefore are not unconstitutional. We agree with the district court's disposition in dissolving the injunction as to the litigation expenses.

Chargeability of Advertising Expenses. The final fair share fee notice in this case contains Expense Item 5, for

> The public advertising of [the national union's] positions on the negotiation, ratification, or implementation of collective bargaining agreements.

J.A. at 590. The district court ultimately denied the objecting employees' request that the unions be restrained from charging for advertising expenses related to collective bargaining because Item 5, by its terms, states that the charge is for expenses incurred by the national union in advertising its positions related to collective bargaining agreements. If this were the sole basis for the district court's decision, we might be inclined to reverse. Item 5 does not, by its terms, provide evidence that the *objectors' unit* benefits from the national union's collective bargaining-related advertising. However, the district court went on to determine that a genuine issue of material fact existed concerning the benefit to the objectors'

unit. Furthermore we agree that collective bargaining-related advertising can be constitutional under *Lehnert*.

Although *Lehnert* did not concern the constitutionality of charges for advertising expenses, the district court analogized collective bargaining- related advertising expenses to strike preparation expenses[4] and collective bargaining-related lobbying expenses it believed that the Supreme Court approved of in *Lehnert*. The district court stated that "[a]dvertising of the union's positions on negotiation, ratification or implementation of collective bargaining agreement is germane to the success of the union's efforts in those **[625]**areas and such expenses may ultimately inure to the benefit of the members of the local." *Reese,* 798 F.Supp. 463, 467 (S.D.Ohio 1992).

Again, the objectors argue that it is unconstitutional for them to have to pay for collective bargaining-related advertising if it benefits other units, even if they are also benefitted. The district court found that the advertising charges here were germane to collective bargaining and that the objectors had not shown that they did not or would not benefit from the expenditure. We do not believe the district court abused its discretion in denying summary judgment to the objecting employees after finding the charges germane to collective bargaining or in dissolving the injunction as to this charge.

Chargeability of Lobbying Expenses. While the district court granted summary judgment to the objectors on the issue of the

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[4] Justices Blackmun, Rehnquist, White and Stevens agreed that the strike preparation expenses (the local and state unions set up a strike "crisis" center) were directly related to negotiating a collective bargaining agreement benefitting the dissenters, imposed no additional burden on the dissenters free speech rights, and was not contrary to public policy. 500 U.S. at 530-32, 111 S.Ct. at 1964-66. Justice Kennedy would agree. 500 U.S. at 562-63, 111 S.Ct. at 1981-82. Justice Marshall approved of the strike prep expenses under the three-prong test, 500 U.S. at 550, 111 S.Ct. at 1975. Justices Scalia, O'Connor and Souter would not permit a charge for strike preparation expenses because "[i]n conducting a strike, a union does not act in its capacity as the government-appointed bargaining agent for all employees." 500 U.S. at 562, 111 S.Ct. at 1981.

chargeability of lobbying expenses for purposes *other than* the negotiation, ratification or implementation of a collective bargaining agreement, the court permitted the unions to assess a fee for

> 6. Lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement.

J.A. at 590. The objectors argue that Item 6 permits charges for lobbying unrelated to their collective bargaining agreement and therefore it fails the last two prongs of the three-prong *Lehnert* test. Finally, they argue that a majority of Justices in *Lehnert* held that *all* lobbying expenses are nonchargeable.

The objectors misunderstand the *Lehnert* plurality position on this issue. In *Lehnert*, four Justices (Blackmun, Rehnquist, White and Stevens) agreed that the lobbying charges *in that case* were not chargeable because they were not related to collective bargaining. The lobbying charges in *Lehnert* were for lobbying in connection with the "Preserve Public Education" program, a program designed to secure funds for education generally in Michigan. In applying the three part test to the lobbying charge for the "Preserve Education Program," Justices Blackmun, Rehnquist, White and Stevens "held" that a state could constitutionally charge dissenters for lobbying expenses only in "the limited context of contract ratification or implementation" but could not charge dissenters for "legislative lobbying or political union activity" without infringing their First Amendment rights. *Id.* at 522, 111 S.Ct. at 1960-61. They also believed that the first two prongs of the test were met only if the lobbying related to the dissenters' collective bargaining agreement. *Id.* at 521, 111 S.Ct. at 1960. As will become evident after reviewing Justice Marshall's view of the chargeability of lobbying expenses, the position of these four Justices is the narrowest ground of agreement and therefore must be applied in this case.[5] *See Triplett Grille, Inc. v. Akron*, 40 F.3d 129, 132 (6th

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[5] Justice Scalia, applying his "statutory duties" test, determined that *the challenged* lobbying expenses in *Lehnert* were not chargeable because "though [public relations and lobbying activities] may affect the outcome of negotiations, [these] are no part of this collective-bargaining process." 500 U.S. at 559, 111

Cir.1994) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds' ") (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977)).

Justice Marshall would have permitted the charges for the challenged "public relations campaign ... a specialized form of lobbying" in *Lehnert*, despite the lack of a close nexus to the dissenters' collective bargaining agree-**[626]**ment, because he believed the public relations campaign to be germane to collective bargaining (serves to influence officials who control the terms of public-sector labor contracts) and because the lobbying placed no additional burden on the First Amendment rights of the dissenters than already imposed upon them by the agency shop laws. 500 U.S. at 543, 111 S.Ct. at 1971. We believe Justices Blackmun, Rehnquist, White and Stevens, and certainly Justice Marshall with his more expansive understanding of collective bargaining-related lobbying, would permit a lobbying expense charge assuming, of course, that the expense satisfied their three-prong test. Based on the record before us, the question remains whether the lobbying expense in Item 6 benefitted the objectors' unit and whether the lobbying expense would satisfy the three-prong test.

For reasons not obvious from the record, the district court did not expressly apply the three-prong test to the extra-unit lobbying expense in Item 6. *J.A.* at 478. Neither did the district court

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S.Ct. at 1979-80. Thus, Justice Scalia (and O'Connor and Souter concurring) would presumably permit a charge for a lobbying expense that was related to a union's duties as statutory bargaining agent. Likewise, Justice Kennedy would permit a charge for a lobbying expense if it was "reasonably or necessarily incurred in the performance of the union's statutory duties as the exclusive bargaining representative." 500 U.S. at 564, 111 S.Ct. at 1982. Justices Scalia, O'Connor, Souter and Kennedy would thus permit lobbying expense charges related to collective bargaining if the objecting employees' unit benefitted and if the expense was incurred as part of the unions' statutory duty of representation; however, theirs was not the majority position on this issue.

determine whether there was a genuine issue of material fact concerning the benefit, if any, the objectors' unit received from this expenditure in deciding the summary judgment motion. Item 6, by its language, states that the lobbying charge is for collective bargaining agreement-related lobbying and therefore is germane to collective bargaining as required by the first prong of the *Lehnert* test. The objectors do not assert that the charge in Item 6 was for a purpose other than collective bargaining-related lobbying. Therefore, the first prong of the *Lehnert* test is met. We must remand, however, for a determination of whether the lobbying expense charge benefitted the objectors' unit and if so, whether the expenditure is justified by the government's vital policy interest in labor peace and avoiding free-riders and whether the charge significantly added to the burdening of free speech that is inherent in the allowance of an agency shop.

The judgments of the district court are AFFIRMED as to the litigation and advertising expenses, but the denial of summary judgment to the plaintiffs is REVERSED as to the lobbying expense in Item 6 and REMANDED for further proceedings. The dissolution of the preliminary injunction is also REVERSED only as to the lobbying expense charge and REMANDED for further proceedings.

APPENDIX C

ENTRY OF FINAL JUDGMENT

OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

January 4, 1994

[Clerk's Stamp Omitted in Printing]
IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RICHARD W. REESE, et al.,	:	**[FILED Jan. 4, 1994]**
Plaintiffs,	:	**Case No. C-2-92-268 (Graham, J.)**
v.	:	**(Mag. Abel)**
CITY OF COLUMBUS, et al.	:	
Defendants.	:	**ENTRY OF FINAL JUDGMENT**

WHEREAS, the parties in this action have entered into a Partial Settlement Agreement resolving claims of the Plaintiffs and of the Class which they represent for damages arising from the allegations set forth in the Plaintiffs' Complaint; and

WHEREAS, pursuant to Rule 23(e), Fed. R. Civ. P., the Court has conducted a hearing following reasonable notice to members of the Plaintiff Class on the fairness of the proposed Partial Settlement Agreement; and

WHEREAS, pursuant to Rule 23(e), Fed. R. Civ. P., the Court determines that the proposed Partial Settlement Agreement is fair and is in the best interest of the members of the Plaintiff Class certified in this case;

THEREFORE, this Court hereby approves the Partial Settlement Agreement entered into between Plaintiffs and Defendants, and enters Final Judgment in this action consistent with this Court's prior rulings and decisions, and consistent with the terms of the Partial Settlement Agreement and the Supplemental Amendment to Partial Settlement Agreement, which are attached hereto.

/s/
Hon. James L. Graham, Judge
United States District Court
Southern District of Ohio

/s/
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December 17, 1993 - 10:48am - GAF
CIN - 41323_1.CIN - 30715\4

PARTIAL SETTLEMENT AGREEMENT

WHEREAS, RICHARD W. REESE, RICHARD D. KAUFMAN, GEORGE R. JORDAN, BETTY SLATER, LARRY L. WYGLE, MARION R. CRAMBLIT, and **TIMOTHY WANNER**, as Plaintiffs, individually and representing a class of current and former employees of the City of Columbus ("the nonmembers"), and Defendants, the **CITY OF COLUMBUS, GREGORY S. LASHUTKA, MAYOR, CITY OF COLUMBUS, LOCAL 1632, OHIO COUNCIL 8, AFSCME ("Local 1632"),** and **OHIO COUNCIL 8, AFSCME ("Council 8")**, are parties to litigation pending in the United States District Court for the Southern District of Ohio, captioned *Reese, et al. v. City of Columbus, et al.*, Case No. C2-92-268; and

WHEREAS, the above-named Plaintiffs and Defendants have agreed to settle and otherwise resolve portions of such litigation, subject to approval by the United States District Court for the Southern District of Ohio, pursuant to the terms of Rule 23 of the Federal Rules of Civil Procedure;

WHEREFORE, the parties set forth the terms of their Partial Settlement Agreement as follows:

1. In settlement of all claims for any monetary relief, including restitution, compensatory damages, and punitive damages, against all Defendants for their collection of agency fees from June 1990 through May 1992 from the nonmembers which were or could have been asserted in this action, Local 1632 and Council 8 ("the union Defendants") shall make payment to the nonmembers totalling Two Hundred Thirty-Seven Thousand Five Hundred Dollars ($237,500.00). The method of distribution to the nonmembers shall be approved by the Court, with distribution to occur not later than thirty (30) days following the Court's final approval of this Partial Settlement Agreement.

[2]Upon the Court's final approval of this Partial Settlement Agreement, the union Defendants shall establish an escrow account under the joint control of the Trial Attorneys for the Plaintiffs and for the union Defendants, from which the settlement proceeds shall be distributed. The settlement proceeds shall be distributed to the nonmembers as an equal proportion of the agency fees collected from them from June 1990 through May 1992, but the parties agree

that the entire amount shall be distributed to the nonmembers, and shall be calculated as follows: the settlement proceeds ($237,500.00) shall be divided by the total amounts collected from the nonmembers from June 1990 through May 1992 (having first subtracted from that figure amounts unilaterally distributed to the nonmembers in November 1992, pursuant to the union Defendants' Motion to Dissolve the Preliminary Injunction). Each nonmember's refund shall be calculated by multiplying the resulting figure [which will be a decimal with a value less than one (1)] by the total amount of agency fees collected from the nonmember (having first subtracted from each figure the amount unilaterally distributed by the union to each nonmember in November 1992).

If, sixty (60) days after the initial mailing of the settlement distribution, any nonmembers have not cashed their settlement checks, the union Defendants shall compile a separate list of names and last known addresses, telephone numbers, and work locations (if known) of those nonmembers, and shall forward the same to counsel for all parties. The parties and their counsel shall then make all reasonable and conscientious efforts to ascertain the current addresses of those nonmembers within thirty (30) days, sharing

information gathered among counsel. The union Defendants shall use the information gathered and shall thereafter mail to each such nonmember another identical check *via* certified mail, return receipt requested. If, sixty (60) days after the certified mailing, those checks have not been cashed by any nonmember(s), or if the certified mailing has been returned, the undistributed amounts remaining in the escrow account shall be paid as a charitable donation — in the name of the named Plaintiffs herein — to the Children's Hospital, Columbus, Ohio.

[3]2. By this Partial Settlement Agreement, the union Defendants, on behalf of themselves and their officers, agents, employees, attorneys, and assigns, hereby fully waive and discharge any claims which they have or may have had against the nonmembers for any agency fees which they would have collected from the nonmembers, but for the preliminary injunction entered by the Court and the terms of this Partial Settlement Agreement, between 7 May 1992 and the date when this Court enters final judgment in this case.

3. The union Defendants shall bear the costs of notifying the nonmembers of the settlement, of distributing the settlement proceeds to the nonmembers, and of calculating the allocation of the

settlement proceeds to the nonmembers. Upon request, Plaintiffs' and their counsel shall have complete access to all information regarding the notification of the nonmembers, the distribution of the settlement proceeds to the nonmembers, and the calculation of the settlement proceeds to be distributed to the nonmembers.

4. Within thirty (30) days of the execution of this Partial Settlement Agreement, counsel for Plaintiffs and counsel for Defendants shall prepare and jointly submit to the Court a proposed form of notice of this settlement to the nonmembers. Any disputes with respect to the form and/or content of the notice shall be resolved by the Court.

5. The union Defendants shall withdraw their pending motion to decertify the class action. Defendants consent to the addition of Marion R. Cramblit and Timothy Wanner as Plaintiffs, and to their certification as class representatives for any further proceedings in this case.

6. Plaintiffs are entitled under the terms of this Partial Settlement Agreement to seek an injunction pending any appeal in this action from the District Court. Should such motion be denied, Plaintiffs waive their right to seek an injunction pending appeal in

this case from the United States Court of Appeals for the Sixth Circuit.

7. Within seven (7) days of the Court's approval of this Partial Settlement Agreement, [4]the union Defendants shall separately pay to Plaintiffs' attorneys, or to their designee, a total of Fifty Thousand Dollars ($50,000.00), in full settlement of Plaintiffs' claim for all costs and/or attorneys' fees accruing to and including 20 September 1993. Pursuant to any rights under the law, Plaintiffs reserve — and the Defendants recognize — their right to seek compensation for their reasonable costs and/or attorneys' fees incurred after 20 September 1993. Defendants reserve the right to oppose such a request for additional costs and/or attorneys' fees for any reasons permitted by law, except that Defendants agree that Plaintiffs are prevailing parties for purposes of liability under 42 U.S.C. §1988 with regard to Plaintiffs' entitlement to their reasonable costs and attorneys' fees for the negotiation and administration of this Partial Settlement Agreement.

8. The parties agree that any appeal by the nonmembers to the United States Court of Appeals for the Sixth Circuit in this case shall be limited to those portions of the District Court's Orders and

Judgments allowing as chargeable to the nonmembers expenditures by Local 1632 and/or its affiliated unions, including Council 8, in the following categories, as listed in the union Defendants' September 1993 notices, to the extent that such expenditures are not incurred for the negotiation and enforcement of the Local 1632/City of Columbus collective bargaining agreement:

> 5. The public advertising of AFSCME's position on the negotiation, ratification, or implementation of collective bargaining agreements.
>
> 6. Lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement.
>
> 15. The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation, or enforcement of collective bargaining agreements or any other litigation berfore agencies or in the courts which concern bargaining unit employees which is normally conducted by an exclusive representative.

9. The parties agree and stipulate that there has been no adjudication by the District Court of issues related to the existence, validity, and/or enforcement of an indemnification agreement between Defendant City of Columbus and the union Defendants.

[5]10. In the event that Plaintiffs prevail in the United States Court of Appeals or the United States Supreme Court with respect to any of the appellate issues itemized in paragraph eight (8), any

award of compensatory damages or restitution shall be adjudicated by the District Court, which retains the authority to refer this matter to a Magistrate Judge pursuant to the provisions of 28 U.S.C. §636, or to a Special Master pursuant to the provisions of Rule 53 of the Federal Rules of Civil Procedure.

11. The parties shall submit to the Court a proposed form of final judgment to be entered by the Court following the Court's final approval of this Partial Settlement Agreement, its ruling on any pending motion, and complete distribution of the settlement proceeds from the escrow account.

12. By this Partial Settlement Agreement, and contingent upon the approval of the District Court of this Partial Settlement Agreement pursuant to Rule 23 of the Federal Rules of Civil Procedure, all Plaintiffs, on behalf of themselves and the class that they represent, and except as specifically stated herein, hereby fully release and discharge Defendants City of Columbus, Gregory S. Lashutka, Mayor, City of Columbus, Local 1632, Ohio Council 8, AFSCME, and Ohio Council 8, AFSCME, and all of their officers, agents, and employees, from any and all liability arising from the events or activities described in the Complaint and First Amended

Complaint in this case including, but not limited to, the collection of agency fees from the nonmembers occurring prior to 20 September 1993.

13. The parties' entry into this Partial Settlement Agreement is contingent upon the District Court's approval, pursuant to Rule 23 of the Federal Rules of Civil Procedure, of all of the terms and conditions set forth herein. In the event that the District Court declines to approve any of the terms of this Partial Settlement Agreement, all of the obligations set forth herein shall be considered null and void, and the parties shall not be bound by any of the terms of this Partial Settlement Agreement.

[6]14. This Partial Settlement Agreement sets forth all of the terms and conditions of the partial settlement agreed to by the parties hereto in the case of *Reese, et al. v. City of Columbus, et al.*, Case No. C2-92-268. This Partial Settlement Agreement may be amended or supplemented in writing only, executed by all of the parties, and subject to the District Court's approval, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

FOR THE PLAINTIFFS:

/s/

W. JAMES YOUNG
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
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(703) 321-8510
Trial Attorney *Pro Hac Vice* for Plaintiffs

FOR THE UNION DEFENDANTS:

/s/

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(513) 762-6271
Trial Attorney for Council 8 and Local 1632

**FOR THE CITY OF COLUMBUS and
GREGORY S. LASHUTKA, MAYOR, CITY OF COLUMBUS:**

/s/

RONALD J. O'BRIEN
City Attorney
90 West Broad Street
Columbus, Ohio 43215
(614) 645-7385
Attorney for the City of Columbus and Mayor Lashutka

SUPPLEMENTAL AMENDMENT TO PARTIAL SETTLEMENT AGREEMENT

WHEREAS, RICHARD W. REESE, RICHARD D. KAUFMAN, GEORGE R. JORDAN, BETTY SLATER, LARRY L. WYGLE, MARION R. CRAMBLIT, and **TIMOTHY WANNER**, as Plaintiffs, individually and representing a class of current and former employees of the City of Columbus ("the nonmembers"), and Defendants, the **CITY OF COLUMBUS, GREGORY S. LASHUTKA, MAYOR, CITY OF COLUMBUS, LOCAL 1632, OHIO COUNCIL 8, AFSCME ("Local 1632")**, and **OHIO COUNCIL 8, AFSCME ("Council 8")**, are parties to litigation pending in the United States District Court for the Southern District of Ohio, captioned *Reese, et al. v. City of Columbus, et al.*, Case No. C2-92-268; and

WHEREAS, the above-named Plaintiffs and Defendants have agreed to settle and otherwise resolve portions of such litigation, subject to approval by the United States District Court for the Southern District of Ohio, pursuant to the terms of Rule 23 of the Federal Rules of Civil Procedure;

WHEREAS, certain individuals (Mitchel R. Peters, David E. Gotschall, Kenneth R. Walker, Yvonne M. Allen, Jeanette Allison, Catherine A. Phillips, and Bill Dawson) who are no longer employed by the City of Columbus and are no longer represented by Local 1632 have raised certain objections to that Partial Settlement Agreement because of their circumstances;

WHEREFORE, for purposes of clarification, and pursuant to ¶14 of the Partial Settlement Agreement, the parties set forth the terms of this Supplemental Amendment to their Partial Settlement Agreement as follows:

[2]1. The release and discharge agreed to by the Plaintiffs, on behalf of themselves and the class that they represent, in no way affects any claim that any class member may have arising from the collection of agency fees during any period during which they were represented by any union other than Local 1632.

FOR THE PLAINTIFFS:

/s/ 12/22/93

W. JAMES YOUNG
c/o National Right to Work Legal

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FOR THE UNION DEFENDANTS:

/s/ 12/21/93

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Trial Attorney for Council 8 and Local 1632

**FOR THE CITY OF COLUMBUS and
GREGORY S. LASHUTKA, MAYOR, CITY OF COLUMBUS:**

/s/ 20 Dec 93

RONALD J. O'BRIEN
City Attorney
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(614) 645-7385
Attorney for the City of Columbus and Mayor Lashutka

APPENDIX D

OPINION AND ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

June 23, 1993

[826 F. Supp. 1115]
Richard W. REESE, et al., Plaintiffs,

v.

CITY OF COLUMBUS,
et al., Defendants.

No. C2-92-268.

United States District Court,
S.D. Ohio, E.D.

June 23, 1993.

* * * *

[1117]OPINION AND ORDER

GRAHAM, District Judge.

This matter is before the Court on the plaintiffs' motion for summary judgment. Plaintiffs are employees of the City of Columbus, Ohio. Defendants are the City of Columbus, its Mayor, sued in his official capacity, and Local 1632 of Ohio Council 8, American Federation of State, County and Municipal Employees (AFSCME). Plaintiffs are members of a bargaining unit represented by Local 1632 but they are not members of the union. The City has recognized Local 1632 as the sole and exclusive representative of the bargaining unit and has entered into a collective bargaining agreement which requires all employees who are not members of the union to pay a "fair share fee" to the local as a condition of their employment. Under the agreement, the City automatically deducts this fee from the paychecks of the nonmember employees. Plaintiffs allege that defendants' payroll deduction procedures vio-[1118]late their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. The Court has previously reviewed the facts and many of the legal principles involved in this case in its Memorandum Opinion and Order of May 7, 1992 in which it

granted plaintiffs' motion for a preliminary injunction restraining the defendants from collecting fees from nonmembers of Local 1632. *See Reese v. City of Columbus*, 798 F.Supp. 463 (S.D.Ohio 1992) (hereinafter "*Reese*"). In the interest of brevity, the Court will refer the reader to that memorandum opinion and order.

Plaintiffs contend that they are entitled to judgment as a matter of law with respect to alleged constitutional deficiencies in defendants' fee collection procedures. It is constitutionally permissible for a public employer to designate a union as the exclusive collective bargaining representative of its employees and to require nonunion employees to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement. *Reese*, 798 F.Supp. at 466. However, nonunion employees have a constitutional right to prevent the union from spending a part of their required fees to support political candidates or to express political views unrelated to the union's duties as exclusive bargaining representative. *Id.* The constitutional requirements for the collection of agency fees include both an adequate explanation of the basis for the fee and a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker. *Id.* The union's duty of adequate disclosure requires it to disclose the major categories of its expenditures and to provide verification by an independent auditor. *Id.*

Defendants began collecting fees from the plaintiffs in June, 1990. In June, July and August of 1990, fees were deducted from the plaintiffs' paychecks without providing any financial disclosures or any notice of procedures available for challenging the fees. Written notices containing financial disclosures and procedures for challenging the fees were given to the plaintiffs on August 22, 1990, October 24, 1990 and November 7, 1991.[1] Plaintiffs claim that each of these notices was constitutionally deficient in certain respects.

---

[1] The notice sent on August 22, 1990 is dated December 1, 1989. After this lawsuit was filed, defendants sent another notice dated September 28, 1992.

LOCAL UNION PRESUMPTION

None of the notices provided any disclosure of Local 1632's chargeable and nonchargeable expenses. In calculating the fair share fee the Union relied on a "local union presumption." *See Reese*, 798 F.Supp. at 467. Such a presumption may not be used to avoid providing detailed audited financial statements of a local union. *Lowary v. Lexington Local Bd. of Educ. (Lowary II)*, 903 F.2d 422 (6th Cir.), *cert. denied*, 498 U.S. 958, 111 S.Ct. 385, 112 L.Ed.2d 396 (1990). Defendants claim that they have provided a factual predicate for the local union presumption which distinguishes this case from *Lowary II*. The evidence defendants have provided to support the local union presumption consists of affidavits indicating that most of the nonchargeable union functions are performed by Ohio Council 8 instead of the locals and an affidavit by the union's counsel which states that in prior arbitration proceedings, including one involving Local 1632, the evidence established that the local union had fewer nonchargeable expenses than Ohio Council 8. However, the audited financial information contained in the fair share fee notice of September 28, 1992 contradicts the local union presumption. It indicates that the nonchargeable expenses of Local 1632 were greater than those of Ohio Council 8. Although in *Lowary II* the court commented on the lack of a factual predicate for the presumption, its holding that the local union presumption is unconstitutional did not rest on that circumstance. In *Lowary II*, the Sixth Circuit said:

> We agree with the reasoning of the court in *Lehnert v. Ferris Faculty Association—MEA—NEA*, 707 F.Supp. 1473 (W.D.Mich.1988), *aff'd*, 881 F.2d 1388 (6th Cir.1989), that such a local union presumption is unconstitutional under *[Chicago Teachers Union, Local No. 1 v.] Hudson* [475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986)] and *Tierney* [*v. City of Toledo*, **[1119]**824 F.2d 1497 (6th Cir.1987)]. Specifically, the court rejected the argument that the local union presumption is constitutional merely because it is rebuttable upon an objection to the impartial decisionmaker. Holding the presumption to be unconstitutional, the court noted that "*the use of the local presumption increases the risk that the*

reduced fee collection from the objector would be in excess of what is appropriate."

903 F.2d at 431 (emphasis added). Thus, in *Lowary II*, the Sixth Circuit specifically adopted the reasoning of the district judge in *Lehnert* who held the local union presumption unconstitutional because: 1. it increases the risk that the fee "would be in excess of what is appropriate" and 2. it "falls short of the precision required under *Hudson*, *Tierney* and *Damiano* [*v. Matish*, 830 F.2d 1363 (6th Cir.1987)]." 707 F.Supp. at 1480.

Defendants' efforts to distinguish *Lowary II* are unavailing; it unqualifiedly holds that the use of a local union presumption is unconstitutional. Furthermore, the manner in which the defendants used the local union presumption in the present case deprived nonmembers of sufficient information to determine the propriety of the fee. *See Hohe v. Casey*, 956 F.2d 399, 410-11 (3d Cir.1992).

Defendants argue that it would be unduly burdensome to perform an audit on each local union and prepare a fair share notice to the nonmembers of each local. However, each local has its own treasurer and maintains its own financial records. Other than conclusory statements, the defendants have provided the Court with no facts which would support their claim that a separate audited statement of the chargeable and nonchargeable expenses of Local 1632 would be unduly burdensome. A separate audited statement for Local 1632 was included in the fair share fee notice of September 28, 1992. Defendants have not provided the Court with any information about the cost of producing that statement. The Court notes that there are approximately 2,000 employees in the bargaining unit represented by Local 1632 and that the dues collected from these employees is approximately $20.00 per month. This would yield an annual income of almost half a million dollars. The Court finds no factual basis for defendants' claim that a separate audited financial statement of Local 1632 would be unduly burdensome. In any event such a statement is constitutionally required regardless of the burden it may impose on the union. *See Lowary II*, 903 F.2d at 431-32. Plaintiffs are entitled to summary judgment on this issue.

FAILURE TO PROVIDE FINANCIAL DISCLOSURES REGARDING AFFILIATED STATE AND NATIONAL UNIONS

Local 1632 pays affiliation fees to other labor organizations, including the AFL-CIO. The fair share fee notices failed to provide any financial disclosure regarding these affiliated labor organizations. The mandate to provide such information is clear. *Reese*, 798 F.Supp. at 467-68. Plaintiffs are entitled to summary judgment on this issue.

FAILURE TO PROVIDE INFORMATION REGARDING THE PROPORTION OR AMOUNTS OF PAYMENTS MADE TO EACH AFFILIATE

Defendants' fair share fee notices do not inform nonmembers of the dollar amount of the payments made to affiliated unions or the percentage of the total agency fee paid to them. A nonmember is entitled to a financial disclosure of the chargeable and nonchargeable expenses of an affiliated union. Such information is relatively useless in the absence of any information about the amount of the fee which is being remitted to an affiliate. The Court addressed this matter in its Opinion and Order of February 13, 1993 and concluded that such a disclosure was constitutionally required. *See* February 19, 1993 Op. and O., pp. 9-10. In *Hohe v. Casey*, 956 F.2d 399, 410 (3rd Cir.1992), the court criticized defendant's fair share fee notice for failing "to inform nonmembers of the amount their locals contributed to Council 13 and the International,...." And in *Weaver v. University of Cincinnati*, 942 F.2d 1039, 1046 (6th Cir.1991), the court held that *Hudson* required the local union "to delineate what portion of the agency fee goes to the Union's affiliates." Plaintiffs are entitled to summary judgment on this issue.

[1120]*DEFINITIONS AND METHODS OF CALCULATIONS USED FOR CHARGEABLE ACTIVITIES*

Plaintiffs assert that the definitions and methods used by the union defendants to determine chargeable activities are vague and constitutionally overbroad and result in charging nonmembers for

constitutionally nonchargeable items. With one exception, discussed below, plaintiffs have not challenged any specific definitions or procedures. It is impossible for the Court to respond to plaintiffs' broadside challenge to unspecified definitions and procedures.

The only specific language of the fair share fee notice which plaintiffs have specifically addressed is the language contained on Page 1 of the November 7, 1991 notice and prior notices which states:

> The reduction in the fair share fee, which has already been granted, reflects expenses to support political and ideological activity and unrelated expenses. The remainder of the fair share fee is the proportionate share of costs of collective bargaining, contract administration *and pursuing matters affecting wages, hours and other terms and conditions of employment.*

(Footnote 10, p. 20 of plaintiffs' memorandum of points and authorities in support of their motion for summary judgment) (emphasis added). Plaintiffs argue that the underlined language is constitutionally overbroad. The Court notes, however, that this language appears in what could be described as the preamble to the definition of chargeable and nonchargeable expenses. Thereafter, the various categories of chargeable, partially chargeable and non-chargeable expenses are specifically defined. Since the definitions of expense categories are more specific they, and not the general preamble, would control. Thus, the Court rejects plaintiffs' argument that the language is unconstitutionally overbroad.

PARTIALLY CHARGEABLE ACTIVITIES

The Court finds, for the reasons stated in *Reese*, 798 F.Supp. at 468, that with respect to Expense Items 17 through 29, the November 7, 1991 fair share fee notice is constitutionally deficient and that plaintiffs are entitled to summary judgment on this issue.

DEFENSIVE ORGANIZING

Plaintiffs object to the chargeability of Expense Item 10 in defendants' fair share fee notice of November 7, 1991 which is substantially the same as Expense Item 12 in the notices of August 22, 1990 and October 23, 1990:

> Defending AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by the unions.

In *Reese*, 798 F.Supp. at 470, this Court concluded that "[d]efensive organizing would serve only the union's self-interest in perpetuating itself as the sole representative of the bargaining unit, a goal which is not germane to collective bargaining activity and which may add to the burden on an objector's First Amendment rights...." A union may not properly charge a nonmember for such expenses. Plaintiffs are entitled to summary judgment on this issue.

ORGANIZING EXPENSES

Plaintiffs challenge Expense Items 22 and 23 in defendants' fair share fee notice of November 7, 1991 which are substantially the same as Expense Items 9 and 10 in the notices of August 22, 1990 and October 23, 1990:

> 22. Organizing within the bargaining unit in which fair share fee or agency shop payers are employed.
>
> 23. Organizing other bargaining units.

The Supreme Court expressly disapproved the chargeability of organizational expenses in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Defendants have attempted to show that, in the context of public employment, organizing is germane to collective bargaining activity because there is a direct linkage between union organizing activity and union bargaining power. The Court rejects this argument finding the linkage attenuated and that requiring nonmem-

bers to contribute to the cost of union organizing would significantly increase the burden on their First Amendment rights. The Supreme Court's decision in *El-***[1121]***lis* strongly suggests that organizing expenses can never pass constitutional muster. Plaintiffs are entitled to summary judgment on this issue.

EXPENSE OF LITIGATION OUTSIDE PLAINTIFFS' BARGAINING UNIT

Ohio Council 8 provides legal services to all of its affiliated local unions on an as-needed basis. The council employs a staff of lawyers and retains outside counsel when necessary. The record shows that the litigation expenses of Ohio Council 8 are directly related to grievance handling, the enforcement of the collective bargaining agreement and negotiating collective bargaining agreements. *See* February 19, 1993 Op. and O., pp. 4-6. In effect, the locals have pooled their resources at the council level in order to obtain legal services when needed. Plaintiffs claim that it is constitutionally impermissible for defendants to charge plaintiffs for any part of the cost of litigation conducted on behalf of the members of other bargaining units. The Court discussed this issue at length in its February 19, 1993 Op. and O. and for the reasons stated therein, the Court finds that defendants may properly include a pro rata share of Ohio Council 8's chargeable legal expenses as part of its agency fee. *See* February 19, 1993 Op. and O., pp. 6-8. Plaintiffs are not entitled to summary judgment on this issue.

ADVERTISING EXPENDITURES

Plaintiffs challenge the constitutionality of Expense Item 5 in defendants' fair share fee notice of November 7, 1991 which is substantially the same as Expense Item 6 in the notices of August 22, 1990 and October 23, 1990:

> The public advertising of AFSCME's positions on the negotiation, ratification, or implementation of collective bargaining agreements.

As defined, such advertising expenses would be directly related to the union's collective bargaining activities. These expenses are analogous to the strike preparation expenses approved in *Lehnert*. Such expenses are not per se unconstitutional. *Reese*, 798 F.Supp. at 469. Plaintiffs are not entitled to summary judgment on this issue.

Plaintiffs object to certain specific advertising expenses deemed chargeable by the defendants, namely advertising expenses related to a protest of the firing of Lori Moon and congratulatory birthday advertisements for both a local union and the Ohio Federation of Teachers. The Court is inclined toward the view that challenges to specific expenditures should be relegated to an arbitrator, a procedure sanctioned in *Lowary II*. *See Lowary*, 903 F.2d at 433. However, since there are only three items presently at issue and the parties have fully briefed the matter, the Court will proceed to rule on them.

The advertising expense for Ms. Moon arose out of a controversy concerning her discharge from public employment while a probationary employee and her allegations of sexual harassment by her employer. Ohio Council 8 incurred advertising expenses to publicize Ms. Moon's allegations of sexual harassment in an attempt to apply pressure on the employer to re-hire her. Ms. Moon was not a member of the bargaining unit represented by Local 1632. This expense was not properly chargeable and impinged upon nonmembers' First Amendment rights. The same is true of the cost of the advertisements congratulating Barberton Local 265 and the Ohio Federation of Teachers on their fiftieth anniversaries. These advertisements were public speech generally in support of public employee unionism which dissenting members should not be required to support. Plaintiffs are entitled to a summary judgment declaring these three items of advertising expense to be unconstitutional.

PROCEDURE FOR CHALLENGING AGENCY FEE

Plaintiffs argue that the union's procedures for challenging agency fees are unconstitutionally burdensome. In support of this

argument, plaintiffs adopt by reference the arguments advanced in support of their motion for a preliminary injunction. Plaintiffs also claim that the requirement that nonmembers file separate objections is unconstitutional and that the notice unconstitutionally suggests that resort to internal union reme-**[1122]**dies is the only method to challenge the amount of the fee. The Court analyzed these issues in *Reese*, 798 F.Supp. at 470-71, and based on that reasoning holds that defendants' procedures for challenging agency fees are constitutional. Plaintiffs are not entitled to summary judgment on this issue.

FAILURE TO PROVIDE AUDITED FINANCIAL DISCLOSURE OF THE EXPENDITURES OF OHIO COUNCIL 8

The November 7, 1991 fair share fee notice and its predecessors did not provide the constitutionally required audited financial disclosure regarding the expenses of Ohio Council 8. See *Reese*, 798 F.Supp. at 468. Plaintiffs are entitled to summary judgment on this issue.

LOBBYING FOR PURPOSES OTHER THAN THE NEGOTIATION, RATIFICATION OR IMPLEMENTATION OF A COLLECTIVE BARGAINING AGREEMENT

Defendants' fair share fee notice of September 28, 1992 includes an expense item for lobbying for purposes other than the negotiation, ratification or implementation of a collective bargaining agreement. The notice states that such expenses are chargeable to the extent that they satisfy the three-pronged test of *Lehnert*. For the reasons stated in its opinion and order of February 19, 1993, the Court finds that such expenses can never pass constitutional muster under *Lehnert* and that plaintiffs are entitled to summary judgment on this issue.

REMEDIES

Plaintiffs are entitled to a declaration that the collection of agency fees from the plaintiff class from June, 1990 to May 7, 1992 did not comport with the constitutional requirements for the

collection of agency fees. Ordinarily, for the reasons stated in *Lowary II*, 903 F.2d at 432-33 and *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1533-34 (6th Cir.1992), restitution should be limited to the unchargeable portion of the fees collected. However, the Court concludes that this case may call for an exception to the general rule. In *Weaver*, the court left open the possibility of full restitution where the constitutional violations are willful or malicious. *Id.* at 1534. This issue cannot be resolved on a motion for summary judgment.

Plaintiffs also seek an award of punitive damages against both defendants. Punitive damages are appropriate in a case such as this when the defendants' conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the plaintiffs' federally protected rights. *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir.1987). "The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant." *Id.* at 1109 (*citing Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir.1983)). Like their claim for full restitution, plaintiffs' claim for punitive damages presents genuine issues of material fact which cannot be resolved on a motion for summary judgment.

The facts of this case do not warrant the imposition of a permanent injunction. The appropriate remedy is damages and the continuation of the present preliminary injunction until such time as defendants provide plaintiffs with a fair share fee notice which passes constitutional muster.

Plaintiffs' motion for summary judgment is granted in part and denied in part.

It is so ORDERED.

APPENDIX E

ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

February 19, 1993

[Clerk's Stamp Omitted in Printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard W. Reese, et al.,

Plaintiffs,

vs.

Case No. C2-92-268
JUDGE GRAHAM

City of Columbus, et al.,

Defendants.

ORDER

On May 7, 1992, the Court issued a preliminary injunction enjoining the defendants from collecting agency fees from nonmembers of defendant Local 1632. On October 6, 1992, defendants filed a motion to dissolve the preliminary injunction. An oral hearing on the motion was held on December 4, 1992 and the matter is now before the Court for a ruling.

The preliminary injunction was premised on the Court's findings that plaintiffs had shown a substantial likelihood that defendants' fee collection procedures were constitutionally deficient in a number of respects. On October 2, 1992, defendants issued a

revised fair share notice to all nonmembers of Local 1632. Defendants contend that the revised notice corrects the deficiencies found by the Court. In addition to issuing the revised notice, defendants represent in their motion that they will rebate the difference in nonchargeable expenses to all members of the plaintiff class and will escrow an amount equal to the proportion of agency [2]fees for matters remaining in dispute pending a final decision by the Court.

The May 7, 1992 order was based upon findings that plaintiffs had established a substantial likelihood of success in showing that the defendants' fair share fee notice was deficient in the following respects: (1) failing to provide an accounting of the chargeable and nonchargeable expenses of the local; (2) failing to provide audited financial statements of all of the affiliates which receive a portion of the agency fee; (3) failing to provide an independently audited statement of Ohio Council 8's allocation between chargeable and nonchargeable expenses; (4) charging nonmembers for defensive organizing expenses; and (5) charging nonmembers for expenses related to organizing within the bargaining unit and in other bargaining units.

The revised notice provides an independently audited financial statement of the chargeable and nonchargeable expenses of Local 1632, which resolves the first deficiency. The revised notice treats payments to the affiliates as completely nonchargeable (the original revised notice contained an error in this regard which defendants will correct), which resolves the second deficiency. The revised notice includes an independent audit of the allocation of the chargeable and nonchargeable expenses of Ohio Council 8, resolving the third deficiency. The revised notice treats all organizing expenses [3]as nonchargeable, curing deficiencies 4 and 5. As a result of these recalculations, the agency fee was reduced from 88.037% to 75.247% of the amount of regular dues. Defendant Ohio Council 8 has agreed to rebate this difference to all members of the class.

In their motion, defendants identify two unresolved issues relating to the agency fee, to wit: advertising expenses and litigation expenses. With respect to these items, defendants propose to escrow a percentage of the agency fee that would cover all such expenses until the outstanding issues are resolved by the Court.

Plaintiffs oppose defendants' motion to dissolve the preliminary injunction, arguing that the revised notice and proposed escrow are constitutionally deficient because (1) defendants are charging nonmembers for litigation expenses not related to the bargaining unit; (2) the revised notice fails to inform the recipient of the amount of the total fee and the amounts paid to each affiliated union; (3) the revised notice indicates that defendants will charge nonmembers for lobbing expenses for purposes other than the negotiation, ratification or implementation of a collective bargaining agreement; and (4) escrow of fees challenged on constitutional grounds is not an adequate remedy.

[4]LITIGATION EXPENSE

In its Memorandum Opinion and Order of May 7, 1992, the Court held at page 14 that plaintiffs had failed to show a substantial probability of success on their challenge to the chargeability of the expense of litigation described in the notice as litigation

> to obtain ratification, interpretation, implementation or enforcement of collective bargaining agreements and any other litigation before agencies or in the courts which concerns bargaining unit employees which is normally conducted by an exclusive representative.

Plaintiffs argued that this definition included litigation outside of their bargaining unit and on behalf of other bargaining units. The Court said, mistakenly, that in Lehnert v. Ferris Faculty Ass'n, _____ U.S. _____, 59 U.S.L.W. 4544 (1991), the Supreme Court disapproved litigation expenses not related to the bargaining unit. Nevertheless, this Court rejected plaintiffs' challenge to these expenses because the notice seemed to indicate that they were limited to the plaintiffs' bargaining unit. Plaintiffs now assert, and defendants do not deny, that this category of expenses does include the cost of litigation outside the plaintiffs' bargaining unit. Thus, the Court must now examine further the issue of chargeability of such expenses.

Ohio Council 8 provides legal services to all of its affiliated local unions on an as-needed basis. The Council employs a staff of lawyers and retains outside counsel when [5]necessary. Defendants assert that the bulk of the litigation expenses of Ohio Council 8 are directly related to grievance handling, the enforcement of the collective bargaining agreement, and negotiating collective bargaining agreements. Defendants have furnished the Court with the affidavit of Rochelle L. Gardner, Associate General Counsel of

Ohio Council 8, which provides detailed information about the kinds of legal services provided by the union during 1990. Ms. Gardner indicates that one-third of the cases litigated were arbitration cases and that over thirty-five of the court cases involved actions to enforce or vacate arbitration awards or to compel the employer to arbitrate. Another third of the cases involved proceedings before the State Employee Relations Board, 67% of which involved unfair labor practice charges in which the union asserted that the employer had failed to bargain in good faith. Another 18% of these cases involved the union's claim that the employer had discriminated against a bargaining unit member for engaging in union activities, and 6% of these cases involved situations in which Ohio Council 8 or a local union had been charged by an employer with failing to bargain in good faith.

Ms. Gardner's affidavit supports defendants' claim that the bulk of the legal serves provided by Ohio Council 8 involves contract enforcement, grievance handling and the negotiation of collective bargaining agreements. This legal work is financed [6]by Ohio Council 8 on behalf of all of its constituent local unions. In effect,

the locals have pooled their resources at the council level in order to obtain legal services when needed.

In Lehnert, Justice Blackmun found "extra-unit litigation to be more akin to lobbying in both kind and effect" and opined that "[w]hen unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative." Lehnert, 59 U.S.L.W. at 4550. This part of his opinion was joined in only by the Chief Justice and Justices White and Stevens and did not represent the opinion of a majority of the Court. However, a majority of the justices did agree "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." Id. 59 U.S.L.W. at 4548. The majority approved of the chargeability of a pro rata share of costs associated with otherwise chargeable activities of state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit so long as there is "some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by

virtue of their membership in the parent organization." Lehnert, 59 [7]U.S.L.W. at 4549. The litigation expenses involved in this case meet these tests and the litigation involved in this case is not "akin to lobbying."

In Lehnert, Justice Scalia, concurring in part and dissenting in part, indicated his agreement with the concept of charging a pro rata share of an affiliated organization's costs for providing collective bargaining services, finding it a tangible benefit to a local union to have such services on call even in years when they are not used. Lehnert, 59 U.S.L.W. at 4559. Justice Scalia's opinion was joined in by Justices O'Connor, Souter and Kennedy. Justice Marshall, in a separate opinion concurring in part and dissenting in part, disagreed with Justice Blackmun's disapproval of extra-unit litigation expenses and indicated that he would apply the general rule of chargeability of extra-unit expenses as part of a share of general collective bargaining costs of a state or national parent union. Id. at 4554. This court concludes that a majority of the Supreme Court would approve the chargeability of the kind of litigation expenses at issue in the present case.

This Court disagrees with the conclusion reached by the Supreme Court of Wisconsin in Browne v. Wisconsin Employment Relations Com'n, 169 Wis.2d 79, 485 N.W.2d 376 (1992), which is based on a mechanistic application of the Supreme Court's decision in Ellis v. Brotherhood of Ry., etc., 466 U.S. 435 [8](1984). The concept of pooling of resources to pay for legal expenses directly related to collective bargaining activities was not before the Court in Ellis. The litigation expenses disallowed in Ellis had no direct relation to collective bargaining activities. This Court does not read Ellis as prohibiting the payment of a share of extra unit litigation expenses directly related to collective bargaining activities as a part of a reciprocal arrangement which guarantees the availability of such services to the unit when needed. These comments about Ellis apply as well to the decision of the Tenth Circuit in Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123 (10th Cir. 1991).

This Court concludes that the members of Local 1632's bargaining unit may properly be charged a pro rata assessment of Ohio Council 8's costs in providing legal services to its various affiliated local unions incident to negotiating and administering the

collective bargaining agreement or to settling grievances or disputes arising under the collective bargaining agreement and of any litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative. See Ellis, 466 U.S. at 453. The Court concludes that plaintiffs have not shown a substantial likelihood of success in challenging these expenses.

[9]FAILURE TO GIVE NOTICE OF THE AMOUNT OF THE AGENCY FEE AND THE AMOUNT PROPORTION OF SUCH FEE PAID TO EACH AFFILI

The revised notice tells the recipient how the agency fee is calculated, what percentage of the total combined expenses of the International Union, Ohio Council 8 and Local 1632 are chargeable, and that the fair share fee will be 75.247% of the amount of regular dues. There is no statement of the amount of regular dues or the amount of the fair share fee, nor is there any statement of the amount of the fee received by each of the three unions. Defendants point out that the amount of the agency fee appears on the nonmembers' pay stub. Thus, the recipient of this notice would be aware of the total amount of the agency fee. However, the recipient would not know either the dollar amount or the percentage of the

total agency fee received by each of the three affiliated unions. Such information would assist a nonmember in determining whether to exercise the right to challenge the chargeability of expenses. For instance, if a nonmember had a potential objection to the chargeability of an item included in the chargeable expenses of Local 1632, the fact that a large part of the monthly payment went to that entity might very well affect a nonmember's decision to challenge the chargeability of that expense. This kind of information was included in the notice considered by the court in Tierney v. City of Toledo, 917 F.2d 927, 937 (6th Cir. 1990). It does not appear that it would impose any undue burden upon the union to include this information in the **[10]**notice, and since it would assist nonmembers in exercising their constitutional rights, the Court believes it should be included in the notice.

LOBBYING FOR PURPOSES OTHER THAN THE NEGOTIATION, RATIFICATION OR IMPLEMENTATION OF A COLLECTIVE BARGAINING AGREEMENT

The revised notice includes a category of expenses which are chargeable to the extent that they satisfy the three-pronged test of Lehnert, which is described as follows:

21. Lobbying for purposes other than the negotiation, ratification or implementation of a collective bargaining agreement.

Plaintiffs argue that charging nonmembers for such lobbying expenses would never be permissible. In Lehnert, all of the justices but Justice Marshall disapproved the chargeability of lobbying activities which do not relate to the ratification or implementation of a collective bargaining agreement.

Defendants argue that lobbying for purposes other than the negotiation, ratification or implementation of a collective bargaining agreement may nevertheless be directly related to the union's duties as the bargaining representative, citing as an example lobbying activities engaged in by Ohio Council 8 concerning health insurance legislation which would impact upon the negotiated health care benefits of union members. Defendants state that "Item 21 is intended to be rarely used and to cover only such a limited situations (sic) as this." Union Defendants' Reply Brief, p. 33. It is perhaps arguable that the kind of lobbying described in defendants' example [11]could pass constitutional muster. However, in light of the almost unanimous holding in Lehnert that such expenses are generally not chargeable, the Court concludes that plaintiffs have

shown a substantial likelihood of success on this issue and that an escrow would not be an adequate remedy.

PROPOSED ESCROW OF CHALLENGED EXPENSE ITEMS

Defendants propose to escrow that portion of the revised agency fee which represents charge which remain in controversy pending a final determination by the Court. While such an escrow arrangement is not an adequate remedy for expenses which the Court has found likely to violate the constitutional requirements of Chicago Teachers' Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) and its progeny, an escrow arrangement would be appropriate for contested charges as to which plaintiffs have not shown a substantial likelihood of a successful challenge.

CONCLUSION

Inasmuch as the Court concludes that the revised notice still fails to comply in certain respects with the constitutional require-

ments of Hudson and its progeny, the motion to dissolve the preliminary injunction is denied.

It is so ORDERED.

/s/
JAMES L. GRAHAM
United States District Judge

DATE: February 19, 1993

APPENDIX F

MEMORANDUM OPINION AND ORDER

OF THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

May 7, 1992

[798 F. Supp. 463]
Richard W. REESE, et al., Plaintiffs,

v.

CITY OF COLUMBUS,
et al., Defendants.

No. C2-92-268.

United States District Court,
S.D. Ohio, E.D.

May 7, 1992.

* * * *

[465]MEMORANDUM OPINION
AND ORDER

GRAHAM, District Judge.

Plaintiffs are nonunion employees of the City of Columbus, Ohio. Defendants are the City of Columbus, the Mayor of Columbus, sued in his official capacity, and Locals 1632 and 2191 of Ohio Council 8, American Federation of State, County and Municipal Employees (AFSCME). The City has recognized Locals 1632 and 2191 as the sole and exclusive representatives of plaintiffs and other city employees for the purposes of collective bargaining and has entered into collective bargaining agreements with the locals which require all employees who are not members of the union to pay a "fair share fee" to the locals as a condition of their employment. Under this agreement, the City automatically deducts the fair share fee from the paychecks of the nonmember employees and forwards the fees to the local unions. Plaintiffs allege that the payroll deduction procedures adopted by the defendants violate their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

This matter is before the Court on the plaintiffs' motion for a preliminary injunction. Arguments on the motion were heard by the Court on April 14, 1992. At that hearing, the parties agreed that the record would consist of the verified complaint and exhibits and the affidavit of William T. Ensley attached to defendants' brief in opposition to the motion for a preliminary injunction. Although the complaint challenges all agency fees collected from nonmembers since April 1990, the motion for preliminary injunction requires the Court to focus its attention specifically on the fair share fee procedure which became effective on November 7, 1991 and which controls current agency fee collections.

[466]The criteria which a district court must balance in determining whether to issue a preliminary injunction are as follows:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;

2) Whether the plaintiffs have shown irreparable injury;

3) Whether the issuance of a preliminary injunction would cause substantial harm to others;

4) Whether the public interest would be served by issuing a preliminary injunction.

NAACP v. City of Mansfield, 866 F.2d 162, 166 (6th Cir.1989). The Court will first consider whether plaintiffs' claims meet the first requirement for injunctive relief.

Plaintiffs challenge the procedure for deducting union dues from their paychecks. It is constitutionally permissible for a public employer to designate a union as the exclusive collective bargaining representative of its employees, and to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301, 106 S.Ct. 1066, 1073, 89 L.Ed.2d 232 (1986). However,

"nonunion employees do have a constitutional right to 'prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.' " *Id.* at 301-302, 106 S.Ct. at 1073, *quoting Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977). Compulsory subsidization of ideological activity by employees who object thereto must be prevented while preserving the union's ability to require every employee to contribute to the cost of collective bargaining activities. *Id.* 475 U.S. at 302, 106 S.Ct. at 1073-74. Procedural safeguards are necessary to achieve these objectives. In order to balance these competing interests, procedures must be carefully tailored to minimize the infringement on nonmembers' First Amendment rights. *Id.* at 303, 106 S.Ct. at 1074.

A nonunion employee must have a fair opportunity to identify the impact of governmental action on his interests and assert a First Amendment claim. Thus, the employee must be given sufficient information to determine the propriety of the fee. *Hudson*, 475 U.S. at 307, 106 S.Ct. at 1076. The constitutional requirements for the collection of agency fees include both an adequate explanation of the basis for the fee and a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker. *Id.* at 310, 106 S.Ct. at 1077-78. While a union is not required to provide nonmembers with an exhaustive and detailed list of all of its expenditures, its duty of adequate disclosure does require disclosure of the major categories of expenses, as well as verification by an independent auditor. *Id.* at 307, n. 18, 106 S.Ct. at 1076, n. 18.

The Sixth Circuit in *Tierney v. Toledo*, 824 F.2d 1497, 1504 (6th Cir.1987) ("*Tierney II*) held that *Abood* and *Hudson* require the following notice:

> Specifically, all non-members must receive an adequate accounting, certified by an independent auditor and setting forth the major categories of the union's budgeted expenses, that enables a non-consenting employee to intelligently appraise what proportion of his dues would be allocable to the costs of negotiating and administering the collective bargaining agree-

> ment and that portion which would advance the union's ideological purposes. The independent auditor must verify each major category in the union's budget or expenses for each major category of expenses and indicate which categories comprise each component.

Plaintiffs claim that defendants' fair share fee procedure notice of November 7, 1991 is constitutionally deficient because it fails to provide audited financial information regarding the chargeable and nonchargeable expenses of Locals 1632 and 2191. The notice contains financial information regarding ASFCME International and ASFCME Ohio Council 8 but contains **[467]**no financial information regarding either of the locals. With respect to the locals, the notice states:

> ASFCME Ohio Council 8 has over two hundred and forty (240) affiliated Local Unions. In addition, there are seventy-four (74) Chapters in various amalgamated Local Unions. In accordance with decisions of the federal courts on the question of how local union expenditures should be allocated for the purpose of determining a fair share fee, the Union has determined that the percentage of chargeable activities of these Local Unions is at least as great as the percentage of chargeable activities of Ohio Council 8. As set forth above, the percentage of Ohio Council 8's expenses that are chargeable to fair share fee payors is 90.869%. This same percentage is used for the said Local Unions to establish the total adjustment in fair share fee.

Defendants' method of calculating the fair share fee paid to the locals on the basis of the ratio of chargeable to nonchargeable expenses of the Ohio Council is referred to as the "local union presumption." The presumption underlying this methodology is that local unions spend a larger percentage of their budgets on chargeable expenses than do state or national unions. The Sixth Circuit has rejected a union's attempt to use such a presumption to avoid providing detailed audited financial statements of local and district affiliates. *Lowary v. Lexington Local Board of Education*, 903 F.2d 422 (6th Cir.1990) ("*Lowary II*").

Defendants attempt to distinguish *Lowary II* on the grounds that in *Lowary II*, the union required the arbitrator to adopt the local union presumption as fact in the event of a challenge to the expense allocation. The Sixth Circuit did not so limit its decision, and agreed with the plaintiffs, 903 F.2d at 431, that this local union presumption permits the unions to avoid providing audited and detailed financial statements to nonmembers concerning the local and district union affiliates in violation of *Hudson*.

Defendants further argue that the local union presumption is properly used here because the filing of a challenge rebuts the presumption and the union then bears the burden of proving the percentage of chargeable expenses at the arbitration hearing. This argument was likewise rejected in *Lowary II*, where the court held, 903 F.2d at 432:

> The union must provide detailed information so that the dissenting teachers can understand why they are being charged. Only then can they make an informed decision.

Thus, *Lowary II* held that the local union presumption violated the union's duty to make a full and adequate disclosure in the initial notice. The Sixth Circuit referred to this burden as a "minimal requirement" in exchange for the interference with the nonmembers' First Amendment right of freedom of association. 903 F.2d at 432. The Sixth Circuit's holding in *Tierney II*, is also germane here. In *Tierney II* the court held that the union must give adequate information before it collects any fee and that it is unconstitutional to require nonmembers to object before receiving adequate information.

The fees deducted from plaintiffs' paychecks are sent to Locals 1632 and 2191, not to Ohio Council 8 or ASFCME International. Plaintiffs have shown a substantial likelihood of prevailing on their claim that they are entitled to an accounting of the chargeable and nonchargeable expenses of the local unions which receive the fees deducted from their pay.

Plaintiffs next argue that defendants have violated their duty to provide adequate financial disclosure by failing to provide audited financial statements of all of their affiliates which receive a portion of the fee. Plaintiffs complain in particular of defendants' failure to provide financial information regarding the AFL-CIO. The notice documents identify the locals as affiliates of the AFL-CIO, and Expense Item 19, which is subject to allocation, includes "supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing the fair share fee payors' employment."

[468]Nonmembers are entitled to "an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and nonagreement related purposes." *Tierney II*, 824 F.2d at 1503. Defendants argue, without benefit of authority, that this level of information is not required at the notice phase of the procedure. The Sixth Circuit has said, however, that the mandate to provide such information is clear. *Tierney v. Toledo*, 917 F.2d 927, 937 (6th Cir.1990) ("*Tierney III*"). Plaintiffs have demonstrated a likelihood of success on the merits on this point.

Plaintiffs next contend that defendants have violated their duty of full and adequate financial disclosure by failing to provide an audited statement of the allocation of chargeable and nonchargeable expenses of Ohio Council 8. With respect to AFSCME International, the independent auditor's report describes in detail the methodology used to make the allocation between chargeable and nonchargeable expenses under the heading "Note 3—Significant Factors and Assumptions Relating to the Allocation of Expenses." For example, subparagraph (a) of Note 3 states:

> Allocations of chargeable and nonchargeable expenses of the program departments are made on the basis of a review of the activities and expenses of the individual departments.

The independent auditor's report with respect to AFSCME International specifically states that the audit included not only the expenses, but also the allocation between chargeable and noncharge-

able expenses. In the case of AFSCME Ohio Council 8, the financial disclosure is markedly different. With regard to Ohio Council 8, the independent auditor's report states:

> We have audited the accompanying balance sheets of AFSCME Ohio Council 8, as of December 31, 1990 and 1989 and the related statements of revenues, expenses, and changes in members' equity, and cash flows for the years then ended. These financial statements are the responsibility of the Council's management. Our responsibility is to express an opinion on these financial statements based on our audits.

While the auditor's report refers to balance sheets and related statements, the financial statement of Ohio Council 8 contained in the notice does not constitute a balance sheet and related statements, but instead is a document entitled "AFSCME Ohio Council 8 Calculation of Chargeable Expense Based on Expense During the Year Ended December 31, 1990 Applicable to Fair Share Fees for the Period January—December, 1992." This does not appear to be the financial statement verified by the auditor. Perhaps the expense information was extracted from the balance sheets referred to in the auditor's report but there is no verification of this. This is evidence that the statement of chargeable and nonchargeable expenses of AFSCME Ohio Council 8 is not independently verified.

Furthermore, the notice contains no information whatsoever as to the method used to allocate chargeable and nonchargeable expenses. There is no explanation of the procedures used to determine just how much of Expense Items 17 through 29 were chargeable and nonchargeable. These items fall into a gray area between chargeable and nonchargeable and have apparently been subjected to some form of proration. While the notice refers to the legal standard enunciated in *Lehnert v. Ferris Faculty Association*, — U.S. —, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991) (see *infra*) it does not explain how that standard was applied, nor does it identify the person(s) who made the determination. Finally, there is no indication that the results of any of the allocation determinations were audited by the independent auditor.

While the Sixth Circuit has held that the issue of chargeability versus nonchargeability is a legal determination as opposed to an auditing function, this does not relieve the union from the duty to provide an adequate disclosure of the methodology used to make the allocation and an auditor's statement showing that the methodology chosen was in fact applied and applied correctly. *See Gwirtz v. Ohio Edu-***[469]***cation Association*, 887 F.2d 678, 682, n. 3 (6th Cir.1989); *Tierney III*, 917 F.2d at 936, n. 7. The Court finds that plaintiffs have shown a likelihood of success in establishing that the financial information concerning AFSCME Ohio Council 8 falls short of the requirements of *Hudson* and its progeny.

Plaintiffs claim that the definitions of chargeable activities used in the notice are vague and constitutionally overbroad. The fair share fee payer notice of November 7, 1991 sets forth three categories of expenses, namely, expenses associated with activities which are (1) totally chargeable (Items 1-16); (2) partially chargeable to the extent that they comport with the three part standard of *Lehnert* (Items 17-29) and (3) totally not chargeable (Items 30-35). Plaintiffs rely in part on the Sixth Circuit's decision in *Tierney II*, 824 F.2d at 1497, where the court held that a union "may collect *only for those expenses affirmatively related to the bargaining agreement.*" (Emphasis in the original).

In light of the Supreme Court's subsequent decision in *Lehnert*, it appears that the rule should be stated somewhat more liberally in favor of the union. In *Lehnert*, — U.S. at —, 111 S.Ct. at 1959, the court distilled the following criteria from previous cases:

> *Hanson and Street* and their progeny teach that chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

The Supreme Court further said that "germane to collective bargaining" does not mean that there must be a direct relationship between the expense at issue and some tangible benefit to the

dissenter's bargaining unit. *Id.* at —, 111 S.Ct. at 1960-61. The Court concluded, *Id.*, that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. However, the Court went on to state that there must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. *Id.* at —, 111 S.Ct. at 1960-61.

Plaintiffs claim that the list of totally chargeable and partially chargeable activities include activities which are totally nonchargeable. They first challenge Item 5:

> The public advertising of AFSCME's positions on the negotiation, ratification, or implementation of collective bargaining agreements.

In *Lehnert*, the Court disapproved the expense of lobbying activities not related to ratification or fiscal approval of collective bargaining agreements. The activity in question related to the activities of a "Preserve Public Education" program. Likewise the Court disapproved public relations expenditures designed to enhance the reputation of the teaching profession. The Court found that neither of these activities were sufficiently related to the bargaining function of the union. Here, however, the advertising expense appears to be related directly to the union's collective bargaining activities. Advertising of the union's positions on negotiation, ratification or implementation of collective bargaining agreements is germane to the success of the union's efforts in those areas and such expenses may ultimately inure to the benefit of the members of the local. These expenses are not unlike the strike preparation expenses approved in *Lehnert*. Plaintiffs have not shown a strong or substantial likelihood of demonstrating that these expenses are nonchargeable.

Plaintiffs object to chargeable expense Item 10:

> Defending AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by the unions.

Defendants justify the chargeability of this expense by relying on *Ellis v. Brotherhood* [470]*of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 453, 104 S.Ct. 1883, 1895, 80 L.Ed.2d 428 (1984) in which the Supreme Court approved expenses of litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit" and of "fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative."

Defendants argue that if litigation expense in connection with jurisdictional disputes is chargeable, then other expenses incurred in defending against efforts by other unions or organizing committees to gain representation rights in units represented by the unions are likewise chargeable. However, there is a difference between litigation related to jurisdictional disputes and defensive organizing. The former would presumably arise in relation to enforcement of the collective bargaining agreement, and thus would be germane to collective bargaining activity. Defensive organizing would serve only the union's self-interest in perpetuating itself as the sole representative of the bargaining unit, a goal which is not germane to collective bargaining activity and which may add to the burden on an objector's First Amendment rights since the objector may favor some other union or no union. Such expenses are similar to the organizing expenses which were disallowed in *Ellis*. *See Albro v. Indianapolis Education Assn.*, 585 N.E.2d 666 (Ind.App.1992). Plaintiffs have shown a substantial probability of prevailing on the merits of this claim.

Plaintiffs challenge chargeable expense Item 16:

> The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation or enforcement of collective bargaining agreements and any other

> litigation before agencies or in the courts which concerns bargaining unit employees which is normally conducted by an exclusive representative.

Plaintiffs argue that this definition includes litigation outside of and on behalf of bargaining units other than the City of Columbus bargaining unit, which the Supreme Court in *Lehnert* found to be completely nonchargeable. Plaintiffs are correct in noting that in *Lehnert*, the Supreme Court disapproved litigation expenses not related to the bargaining unit, however, here the expense category, by reason of the wording "litigation before agencies or in the courts which concerns bargaining unit employees," appears to be limited to the bargaining unit. Plaintiffs have not shown a substantial likelihood of establishing that this category includes any nonchargeable expenses.

Finally, plaintiffs challenge expenses Items 22 and 23 which are listed as chargeable to the extent that they meet the three-part test of *Lehnert*. These expenses are defined as follows:

> 22. Organizing within the bargaining unit in which fair share fee or agency shop payers are employed.
>
> 23. Organizing other bargaining units.

While these expense items are prefaced with the statement that they are chargeable only to the extent that they satisfy the three-part test of *Lehnert*, the Supreme Court expressly disapproved the chargeability of organizational expenses in *Ellis*, indicating that such expenses can never pass muster under the *Lehnert* test. Plaintiffs have shown a substantial likelihood of success on the merits on this claim.

Plaintiffs claim that defendants' procedure for challenging its agency fee contains language which unduly restricts an objector's right of access to the federal courts. On page 4 of the notice, following the list of expense items and the statement of the fair share fee percentage, the following statement appears:

> If you wish to challenge the adjustment calculations, you must comply with the challenge procedure set forth below.

The opening paragraph of the challenge procedure reads as follows:

> [471]A procedure has been established for challenging the amount of the fair share fee adjustment, i.e. the foregoing calculations ... *You must comply with these procedures in order to challenge the fair share fee adjustment*. (Emphasis supplied).

Hudson and its progeny require that an agency fee collection plan must "provide for a reasonably prompt decision by an impartial decisionmaker" when nonmembers object to the amount of the agency fee. *Hudson*, 475 U.S. at 307, 106 S.Ct. at 1076. A procedure which provides for reasonably prompt arbitration of agency fee disputes by an impartial arbitrator complies with this requirement. However, it is well settled that no administrative remedies need be exhausted before bringing an action under 42 U.S.C. § 1983. *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).

Citing *Tierney III*, plaintiffs contend that the language of the challenge procedure unduly implies a limitation on the nonmembers' constitutional rights. However, the language involved here differs from that before the court in *Tierney III*. There, the arbitration procedure contained the requirement that any objecting nonmember "must exhaust the remedies provided by this procedure prior to seeking judicial review of any issues capable of resolution under this procedure." *Tierney III*, 917 F.2d at 933. The Sixth Circuit held that this language unduly implied a limitation on the nonmembers' constitutional rights. Here, there is no language requiring exhaustion of remedies. Furthermore, the requirement that an objector comply with the arbitration procedures is limited to challenges to the "adjustment calculations" and the "fair share fee adjustment" which can fairly be read to apply to issues concerning chargeability versus nonchargeability of particular union expenditures which are generally for the impartial decisionmaker in the first instance and not the federal courts. *See Tierney III*, 917 F.2d at 940. Plaintiffs

have failed to show a substantial likelihood of establishing that the notice of arbitration procedure unduly implies a limitation on a nonmembers' constitutional rights.

Citing *NAACP v. Button*, 371 U.S. 415, 440-45, 83 S.Ct. 328, 341-44, 9 L.Ed.2d 405 (1963), plaintiffs claim that the requirement that each objecting employee file a separate charge unduly restricts the First Amendment right of nonunion employees to associate for the purposes of litigation. Plaintiffs argue that objecting employees have a constitutional right to challenge the union's fee calculation as a group. Paragraph A of the challenge procedure provides as follows:

> The Challenge: Each fair share fee payor must file a separate challenge. The challenge must be filed in writing. The written challenge must include the following: 1. Fair share fee payor's name, address and telephone number. 2. Social security number. 3. Name of employer. 4. Employing agency. 5. Work location. 6. Job Title. 7. Local union representing the unit. The written challenge must be received by Ohio Council 8 between November 12 and December 11, 1991.

Paragraph B of the challenge procedure includes the following provision: "All challenges filed within the prescribed time period will be consolidated into a single proceeding."

While the procedure does require each objector to file a separate challenge, there is no separate fee required. All that is required is that each individual objector state his or her name and certain identifying information. All challenges filed within the prescribed time are to be consolidated into a single proceeding. The Court concludes that plaintiffs have not established a substantial likelihood of showing that these procedures unduly restrict the right of objectors to associate for the purposes of challenging the agency fee adjustment.

Plaintiffs have established a substantial likelihood of proving that defendants' agency fee collection procedures are constitutionally deficient in several respects. Plaintiffs have shown a strong or

[472]substantial likelihood or probability of success on the merits on many, albeit not all, of their claims. Since plaintiffs have demonstrated a substantial likelihood of showing that defendants' fee collection procedures are constitutionally deficient, they have shown a likelihood of irreparable injury due to the resulting infringement of their core First Amendment rights. Defendants can demonstrate no injury of comparable importance which would result from the issuance of an injunction. Defendants have no right to collect fees from nonmembers using an invalid collection procedure. *See Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir.1991); *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir.1988); *Tierney II*, 824 F.2d at 1504. The issuance of a preliminary injunction would not cause substantial harm to any third party. Since the granting of a preliminary injunction is necessary to prevent further infringement of the plaintiffs' core First Amendment rights, the granting of such an injunction would be in the public interest. Balancing all of the factors relevant to the issuance of a preliminary injunction, the court concludes that plaintiffs' motion for a preliminary injunction is well taken.

Plaintiffs bring this action as a class action on behalf of themselves and others similarly situated and seek to represent a class that consists of all employees of the City of Columbus within the relevant bargaining units who are nonmembers of the locals or were nonmembers at any time when the agency fees were seized from them. While the Court has not yet determined that this action should proceed as a class action, it appears very likely that plaintiffs' request for class action certification will be granted. Therefore, plaintiffs' request for classwide preliminary injunctive relief is granted.

Defendants are preliminarily restrained until further order of this Court from taking payroll deductions from or in any other way collecting agency fees from nonmembers of Local 1632 and Local 2191, Ohio Council 8, American Federation of State, County, and Municipal Employees. Plaintiffs shall post a bond in the amount of $1,000.

It is so ORDERED.

APPENDIX G

RELEVANT CONSTITUTIONAL PROVISIONS; 42 U.S.C. § 1983; AND OHIO REVISED CODE § 4117.09(C)

UNITED STATES CONSTITUTION

Amendment I—Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV—Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIVIL RIGHTS ACT OF 1871

42 U.S.C. § 1983. Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United State or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. ****

OHIO'S PUBLIC EMPLOYEES' COLLECTIVE BARGAINING LAW

Ohio Revised Code § 4117.09

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. ****

(2)

Supreme Court, U.S.
FILED
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No. 96-186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

RICHARD W. REESE; GEORGE R. JORDAN; RICHARD D. KAUFMAN; BETTY SLATER; LARRY L. WYGLE; MARION R. CRAMBLIT; TIMOTHY WANNER, on behalf of themselves and the class that they represent,

Petitioners,

v.

CITY OF COLUMBUS; GREGORY S. LASHUTKA, MAYOR; LOCAL 1632, AFSCME; OHIO COUNCIL 8, AFSCME,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The City of Columbus, Ohio and Local 1632 of the American Federation of State, County and Municipal Employees have negotiated a standard union security agreement requiring all covered employees to contribute to the costs of union representation by paying agency fees. Local 1632 and other locals affiliated with AFSCME and its councils have pooled their resources, including funds collected pursuant to union security agreements, for the purpose of financing legal services involving contract enforcement, grievance handling and contract negotiations and publicizing AFSCME's position on the negotiation, ratification or implementation of affiliated locals' collective bargaining agreements.

The question presented here is whether the courts below abused their discretion in denying both summary judgment to the plaintiff fee payers on, and a preliminary injunction against, the use of agency fees paid by employees who object to financially supporting non-collective bargaining activities to create such a pool of collective bargaining resources.

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---

BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction and the constitutional and statutory provisions involved are correctly set out in the petition for writ of *certiorari*. Pet. 1-2, 1a-70a.

STATEMENT OF THE CASE

Local 1632, American Federation of State, County and Municipal Employees ("AFSCME") is the exclusive bargaining representative for approximately 2,500 employees who work for the City of Columbus. Union representation is provided to these employees through a three tiered

structure: a local union that represents employees in a single bargaining unit (Local 1632); a state-wide union made up of such locals (Ohio Council 8); and a national union made up of such locals and councils (AFSCME). Accordingly, the dues and agency fees paid by the represented employees are divided among Local 1632, Ohio Council 8 and AFSCME.

All three tiers of the union provide services to represented employees working in its various bargaining units. Local 1632 is the formally recognized exclusive bargaining representative for the City of Columbus bargaining unit and provides employees in that unit with direct representation at their worksites. Ohio Council 8, which has approximately 240 affiliated local unions and 74 chapters, has a professional staff which performs most of the bargaining and contract enforcement for its affiliated local unions. AFSCME, which has approximately 70 councils and more than 3,000 affiliated local unions, provides specialized services to these councils and locals on an as-needed basis.

On March 25, 1992, the petitioners, who were employed by the City of Columbus and represented by Local 1632, initiated this action against the City of Columbus, its Mayor, Local 1632, and Ohio Council 8. The petitioners are not members of Local 1632, but by reason of a union security clause in their collective bargaining agreement pay agency fees to Local 1632 as a condition of employment. In their complaint, the fee payers alleged that the respondents violated their constitutional rights by failing to provide them with a proper notice prior to the collection of the agency fees. R. 1: Complaint.

On May 7, 1992, the District Court issued a preliminary injunction against the collection of agency fees from the petitioners. Pet. App. F. On October 6, 1992, Local 1632 filed a motion to dissolve the preliminary injunction based on a revised notice correcting the alleged deficiencies

and a recalculated fee. R. 45: Motion to Dissolve Preliminary Injunction. The petitioners raised new challenges to the revised notice, and on February 19, 1993, the District Court denied the motion to dissolve the preliminary injunction. Pet. App. E.

On January 15, 1993, the fee payers moved for summary judgment, seeking a ruling that the agency fees already collected violated the fee payers' constitutional rights. In an Opinion and Order entered on June 23, 1993, the District Court granted in part and denied in part the fee payers' motion for summary judgment. Pet. App. D. At the conclusion of its summary judgment opinion, the District Court stated that it would continue the preliminary injunction until such time as Local 1632 issued a notice to the fee payers meeting the requirements of that court's opinions. *Id.* at 40a.

On September 20, 1993, after Local 1632 had issued a revised notice and fee calculation to the fee payers and submitted copies to the court, the District Court granted the Union's motion to dissolve the preliminary injunction. R. 94: Entry Dissolving Injunction.

Then, on September 23, 1993, the parties reached a settlement disposing of all but three issues in this case. The partial settlement agreement, which was approved by the District Court, provided that any appeal would be limited to the propriety of the District Court's rulings with respect to whether the following categories of expenditures could be financed by pooling resources among affiliated local unions:

> 5. The public advertising of AFSCME's position on the negotiation, ratification, or implementation of collective bargaining agreements.
>
> 6. Lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement.
>
> 15. The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation,

> implementation, or enforcement of collective bargaining agreements or any other litigation before agencies or in the courts which concern bargaining unit employees which is normally conducted by an exclusive representative. [Pet. App. 23a.]

On October 4, 1993, the fee payers filed a Notice of Appeal from the dissolution of the preliminary injunction and on January 27, 1994, the fee payers filed a notice of appeal from the entry of judgment based on the partial settlement agreement.

On the consolidated appeals, the Sixth Circuit identified the issue before it as whether the District Court had committed an "abuse of discretion" or acted on an erroneous "legal premise" in "dissolving a preliminary injunction." Pet. App. 5a. In passing on this issue, the Court of Appeals also addressed the correctness of the District Court's denial of the petitioners' motion for summary judgment.

With respect to the first and third expenditure categories listed above—advertising the union's position on contract negotiation and enforcement and financing litigation directly related to the negotiation or enforcement of contracts—the Court of Appeals found that the District Court did not abuse its discretion or act on an erroneous legal premise in denying summary judgment, because "a disputed issue of material fact existed," or in dissolving the preliminary injunction, because "the objectors did not enjoy a substantial likelihood of success in their challenge of th[ese] charge[s]. . . ." Pet. App. 8a (collective bargaining litigation). *See also id.* at 9a-10a (holding the same with respect to collective bargaining advertising).

With respect to the third expenditure category—lobbying for the negotiation, ratification, or implementation of a collective bargaining agreement—the Court of Appeals reversed the District Court and remanded "for a determination of whether the lobbying expense charge benefitted the objectors' unit and if so, whether the expenditure is justified by the government's vital policy interest in labor

peace and avoiding free-riders and whether the charge significantly added to the burdening of free speech that is inherent in the allowance of an agency shop." Pet. App. 13a. And, as to this category of expenditure, the Court of Appeals reinstated the preliminary injunction. *Id.*

ARGUMENT

1. In substance the *certiorari* petition presents a single interlocutory legal issue:

> Did the courts below err in concluding that the petitioners, as agency fee payers, were not entitled to a summary judgment sustaining their claim that, as a matter of law, unions may not charge fee payers for the following categories of collective bargaining activities financed by pooling the resources from various represented bargaining units:
>
> - The public advertising of the union's position on the negotiation, ratification, or implementation of collective bargaining agreements.
> - The prosecution or defense of arbitration, litigation or charges to obtain ratification, interpretation, implementation, or enforcement of collective bargaining agreements or any other litigation before agencies or in the courts which concern bargaining unit employees which is normally conducted by an exclusive representative.

The decision below is correct in rejecting petitioners' challenge to the pooled multi-bargaining unit financing of these direct collective bargaining activities. The general principles governing the rights and obligations of agency fee payers stated by this Court in the line of cases from *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), to *Lehnert v. Ferris Facutly Ass'n,* 500 U.S. 507 (1991), applied to the specific union activities at issue here, dictate that result. And, while petitioners claim otherwise, there is nothing in the *Lehnert* opinions' treatment of litigation that makes the pooled financing of the legal activities in this case unlawful *per se*. At least

equally to the point, the decision below is the only federal court of appeals decision that addresses the chargeability to fee payers of these two categories of union activity as financed on a multi-bargaining-unit, pooled-resources basis. The "conflict" cases the petitioners cite deal with conceptually different issues. Particularly since the opinion of the court below is not cast as a final ruling on the merits of the petitioners' claims—but only as a ruling upholding the denial of summary judgment and the vacation of a preliminary injunction—this case in its present procedural posture does not raise any question warranting this Court's review.

2. As an overall matter it is lawful for a union to make use of agency fees from objecting fee payers "to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment. . . ." *Abood*, 431 U.S. at 225-226. And in *Lehnert*, this Court unanimously concluded that it is lawful to "utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 500 U.S. at 519.

In his *Lehnert* opinion, Justice Blackmun explained:

> [T]he unified-membership structure under which many unions, including those here, operate . . . is [premised on] the notion that the parent [organization] will bring to bear its often considerable economic, political, and informational resources when the [unit] is assessed for the bargaining unit's protection, even if it is not actually expended on the unit in any particular membership year. [*Id.* at 523.]

Justice Scalia made the same point in his separate opinion: "It is a tangible benefit . . . to have expert consulting services on call, even in the years when they are not used." *Id.* at 562.

On this basis, the *Lehnert* Court ruled that local "unions may bill dissenting employees for their share of

general collective-bargaining costs of the[ir] state or national parent union," because so long as "these costs [are found] to be germane to collective bargaining and similar support services . . . [n]o greater relationship is necessary" to make them chargeable to objecting fee payers. 500 U.S. at 527.

3. In this case, the petitioners challenge the legality of charging fee payers on a multi-bargaining unit basis for a program whereby Local 1632 joins with other AFSCME "locals [that] have pooled their resources at the council level in order to obtain legal services when needed" for "litigation . . . directly related to grievance handling, the enforcement of the collective bargining agreement and negotiating collective bargaining agreements." Pet. App. 7a (Court of Appeals), quoting *id.* at 37a (District Court). The District Court's opinion describes the litigation that is so financed in some detail:

> [O]ne-third of the cases litigated were arbitration cases and . . . over thirty-five of the court cases involved actions to enforce or vacate arbitration awards or to compel the employer to arbitrate. Another third of the cases involved proceedings before the State Employee Relations Board, 67% of which involved unfair labor practice charges in which the union asserted that the employer had failed to bargain in good faith. Another 18% of these cases involved the union's claim that the employer had discriminated against a bargaining unit member for engaging in union activities, and 6% of these cases involved situations in which Ohio Council 8 or a local union had been charged by an employer with failing to bargain in good faith. Pet. App. 46a.

It is plain—and the petitioners do not even deny—that these legal expenses are, as the lower courts recognized, *directly related to collective bargaining*. It is also plain—and the petitioners do not deny—that under *Abood* it is appropriate to charge objecting fee payers the costs of such legal services incurred for their own bargaining unit.

And, we submit that it is equally plain that where, as here, direct collective bargaining activity is at issue, the very point of *Lehnert* is to validate charges to fee payers for "that part of a local's [payments] which contributes to the pool of resources potentially available to the local . . . even if it is not expended on [the fee payers'] unit in any particular membership year." 500 U.S. at 523.

Indeed, petitioners do not even attempt a reasoned distinction of such legal activity directly related to collective bargaining from other direct collective bargaining activity. Rather, they argue that this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), requires single bargaining unit financing of legal activity and that *Lehnert* embraces this holding. Pet. 14-18. Petitioners dramatically overread *Ellis* and misread the multiple opinions in *Lehnert*.

What *Ellis* does is to accept the argument that a "single bargaining unit" limitation should apply with respect to the "*general* litigation. . . ," 466 U.S. at 441 (emphasis added), at issue in that case, which, as the lower court opinions there explain, "did not pertain to any specific collective bargaining agreement or grievance. . . ," *Ellis v. Railway Clerks*, 685 F.2d 1065, 1073 (9th Cir. 1982).

There is nothing in *Lehnert* that expands *Ellis*' ruling on such "general litigation"—which covers legal activity at some remove from the union's core collective bargaining functions—to govern the quite different situation presented by *direct* collective bargaining litigation.

Justice Kennedy's opinion is the *only Lehnert* opinion that directly addresses the issue of "litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative." 500 U.S. at 563. *See also id.* at 564. And, Justice Kennedy could "discern no additional burden on free speech from . . . . an arrangement" for financing such litigation on a resource-pooling basis. *Id.* Not surprisingly, Justice Scalia's opinion for himself and three other Justices—including Justice Kennedy—is

entirely consistent in its general approach with Justice Kennedy's particularized treatment of litigation. *See id.* at 561-562 (chargeable expenditures need not be broken down by bargaining unit).

Justice Marshall, in his turn, would have allowed all employment-related litigation—including of course, litigation directly related to collective bargaining, to be financed on a multi-unit basis. *Id.* at 544-549.

Justice Blackmun, writing for himself and three other Justices, did not treat with direct collective bargaining litigation in terms. Rather, his opinion reasons that, given "the important political and expressive nature of litigation" and the fact that "union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination," at least *some* employment-related litigation can be charged only on a unit-by-unit basis. 500 U.S. at 528. But, Justice Blackmun's line of reasoning and his reliance on *Ellis* in this portion of his opinion supports the understanding that he endorsed the unit by unit approach only for the sort of "general litigation" that was at issue in that earlier case.

In sum, both *Lehnert's* general principles and the treatment of litigation in the four *Lehnert* opinions show that the refusal of the courts below to grant the petitioners summary judgment or a preliminary injunction with regard to the legal activities here is correct.

4. The petitioners assert that three lower court decisions are in conflict with the decision below on the issue of direct collective bargaining litigation. *Pilots Against Illegal Dues v. Air Line Pilots,* 938 F.2d 1123 (10th Cir. 1991); *Browne v. Wisconsin Employment Relations Comm'n,* 169 Wisc.2d 79, 485 N.W.2d 376 (1992); *Albro v. Indianapolis Education Ass'n,* 585 N.E.2d 666 (Ind. Ct. App. 1992). However, none of these cases presented the distinction between the chargeability of "litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative," *Lehnert,* 500 U.S. at 563

(opinion of Kennedy, J.), and the chargeability of the "diverse range" of litigation that includes cases of an "important political and expressive nature," *id.* at 528 (opinion of Blackmun, J.), which fall under the rubric of "general litigation" as used in *Ellis,* 466 U.S. at 441. Precisely because the decision below turned on this important distinction and does treat separately with direct collective bargaining litigation, it presents no conflict with the lower court cases relied upon by the petitioners.

5. The courts below also refused to enjoin the use of the petitioners' fee payments to finance "public advertising of [the national union's] positions on the negotiation, ratification, or implementation of collective bargaining agreements," Pet. App. 9a (Court of Appeals), quoting *id.* at 37a (District Court), insofar as such "advertising expense appears to be related directly to the union's collective bargaining activities," Pet. App. 63a. The District Court based its ruling on its determination that "[a]dvertising of the union's positions on negotiation, ratification or implementation of collective bargaining agreements is germane to the success of the union's efforts in those areas and such expenses may ultimately inure to the benefit of the members of the local." *Id.*

Aside from a faulty analogy, the petitioners provide no support for their claim that while they may be charged for public statements regarding the union's position with respect to contract negotiations or enforcement within the petitioners' unit, their fee payments may not be used to create a pool of resources available for making such statements with regard to any unit contributing to the pool.

What the petitioners do argue is that the public statements regarding collective bargaining issues, which the courts below held could be financed on a multi-unit basis, should be equated to the "public speech in support of the teaching profession generally," addressed in *Lehnert* and found not chargeable at all. Pet. 23, quoting 500 U.S. at 528. Far from allowing the union to use objectors' pay-

ments to support such general public pronouncements, the district court specifically *forbade* the union to use the petitioners' payments for public statements regarding employment practices affecting unrepresented employees or "generally in support of public employee unionism. . . ." Pet. App. 38a. Precisely because of that ruling, the portion of *Lehnert* petitioners rely on is inapposite.

6. The petitioners' complaint with the Court of Appeals' ruling on lobbying goes to the formulation used by that court in its directions on remand. Pet. 26. Since the Court of Appeals' remand directions are taken almost verbatim from Justice Blackmun's *Lehnert* opinion, that complaint is without substance. Pet. App. 13a. Equally to the point, the *ruling* by the courts below on the lobbying issue is in the petitioners' *favor* to the extent of preliminarily enjoining the collection of fees from them to finance such activities.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Rule 56(a), FED.R.CIV.P. 2

I. RESPONDENTS MANUFACTURE DISPUTED FACTS WHERE NONE EXIST.

Respondents' Brief in Opposition ("Opposition") is a mixture of misrepresentations of, and omissions from, the record.

Respondents suggest that Petitioners are wrongly appealing from the denial of summary judgment. Opposition at 5-6 ("the opinion of the court below is not cast as a final ruling on the merits of the petitioners' claims—but only as a ruling upholding the denial of summary judgment and the vacation of a preliminary injunction—this case in its present procedural posture does not raise any questions warranting this Court's review").

Unexplained is why no one—not Respondents (who never before asserted such a claim), nor any member of the panel—noticed that Petitioners' appeal should, therefore, have been dismissed. *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1094 (6th Cir. 1992) (denials of summary judgment motions ordinarily are not appealable). Also unexplained is why, if "facts" were still at issue, the District Court ordered a trial **only** as to Petitioners' entitlement to punitive damages. App. D at 39a-40a; 826 F.Supp. 1115, 1122 (S.D. Ohio 1993). These failures explain why Respondents' suggestion is baseless.

This case does not present an "**interlocutory** legal issue," Opposition at 5 (emphasis added), simply because one of **two** appeals consolidated in the Sixth Circuit was from the District Court's vacation of its injunction, or because the District Court initially expressed its legal conclusion in an interlocutory, but appealable, order. That preliminary legal determination was, of course, rendered final when the District Court entered final judgment "for the reasons stated" in its Opinion and Order denying an earlier motion to dissolve the preliminary injunction. App. D at 37a; 826 F.Supp. at 1121. The District Court entered Final Judgment, App. C at 22a-23a, holding, **as a matter of law**, that nonmembers may constitutionally be charged for public speech unrelated to bargaining over their terms and conditions of employment—litigation, lobbying, and public relations/advertising expenditures for bargaining units other than their City of Columbus bargaining unit.

Moreover, contrary to Respondents' claims, neither of the lower courts ever found that "a disputed issue of material fact existed," Opposition at 4, as to whether nonunion public employees constitutionally can be required to contribute, as a condition of their continued employment, to the costs of: (1) litigation activities concerning bargaining units other than the employees' unit ("extra-unit litigation"); and (2) lobbying related to issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the employees' bargaining unit ("extra-unit lobbying"), incurred by the state and national affiliates of the bargaining representative imposed upon them by force of law.

To the contrary, the District Court's judgment was solely based upon the application of Rule 56(a), FED.R.CIV.P., *i.e.*, that the pleadings and evidence showed that there was no genuine issue as to any material fact and that, as a matter of law, entry of judgment was appropriate. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). *See* App. E at 45a ("The Court said, mistakenly, that ... the Supreme Court disapproved litigation expenses not related to the bargaining unit"), and App. D at 37a-38a (denying summary judgment as to these issue on purely legal grounds).[1] The Sixth Circuit recognized this fact when it affirmed as to these issues.

The panel understood that the District Court's decision constituted a purely legal determination. App. B at 8a; 71 F.3d 619, 623-34 (6th Cir. 1995) ("Although originally concluding that this charge was unconstitutional, ... the district court later reversed its view"; "the district court was faced with the difficult task of interpreting *Lehnert [v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)]").

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[1] While the panel phrased its review of the dissolution of the preliminary injunction in terms of determining whether the district court has "abused its discretion," this must be understood in light of the circuit law that discretion is abused in determining issues surrounding a preliminary injunction "when it improperly applies the law or uses an erroneous legal standard." *See, e.g., Lowary v. Lexington Loc. Bd. of Educ.*, 854 F.2d 131, 134 (6th Cir. 1988), *citing Christian Schmidt Brewing Co. v. G. Heilman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 469 U.S. 1200 (1985).

Likewise, the panel was informed by the belief that the factual record was inadequate only as to the "lobbying expense in item 6." App. B at 13a.[2] This was because, in the panel's judgment, "For reasons not obvious from the record, the district court did not expressly apply the three-prong test to extra-unit lobbying expense in Item 6." *Id.* at 12a. Respondents' contrary assertion misrepresents the decisions below.

II. RESPONDENTS IGNORE THE SERIOUS FIRST AMENDMENT IMPLICATIONS OF THIS CASE.

Most striking is Respondents' silence about the first amendment implications of the decision below. Indeed, one searches the Opposition in vain for reference to the first amendment.

Nevertheless, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 221-22, 232 (1977), established that a strict form of scrutiny is required to determine chargeability; *Ellis v. Railway Clerks*, 466 U.S. 435, 456 (1984), and *Lehnert*, 500 U.S. at 518, applied it.

All of the expenditures at issue here have significant "directly communicative content and involve the expression of ideas." *Ellis*, 466 U.S. at 456. Thus, expenditures for these activities are not chargeable because they "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. Indeed, public relations/advertising and lobbying are "at the heart of the First Amendment's protection." *First National Bank v. Bellotti*, 435 U.S. 765, 776 (1978); *see Meyer v. Grant*, 486 U.S. 414, 427 (1988). Likewise, this Court has "long recognized the important political and expressive nature of litigation." *Lehnert*, 500 U.S. at 528, *citing NAACP v. Button*, 371 U.S. 415, 431 (1963).

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[2] Because, as a matter of law, expenditures for public relations/advertising for issues other than the ratification of, or authorization or appropriation of funds for, the agreement covering the nonmembers' bargaining unit ("extra-unit public relations/advertising"), never are chargeable under this Court's prior decisions—no matter the factual determinations which might be made by trial court pursuant to the panel's remand—review also is sought for this category of expenditures.

The extra-unit expenditures at issue are expressive because, as in *Lehnert*, they "are connected with political positions and philosophies with which the dissenters disagree." 881 F.2d 1388, 1395 (6th Cir. 1989) (Merritt, J., dissenting in part). Such activities—including the petitioning of government on subjects other than the nonmembers' terms and conditions of employment—are pure speech activities. Thus, the license grudgingly granted to unions by this Court to compel nonmembers to support such activities as they relate directly to "legislative ratification of, or fiscal appropriations for, their collective bargaining agreement," *Lehnert*, 500 U.S. at 519; *see also id.* at 559 (Scalia, J., concurring), does not and cannot extend beyond that limited context. *Lehnert* carved out a narrow exception to this Court's bar, *Machinists v. Street*, 367 U.S. 740, 768-69 & n.17 (1963), against charging nonmembers for **any** lobbying activities. 500 U.S. at 520; *see also id.* at 559 (Scalia, J.). The Sixth Circuit ignored this bar when it held that nonmembers can be compelled to subsidize such activities beyond the confines of their bargaining unit.

III. RESPONDENTS MINIMIZE THE CONFLICTING VIEWS OF THE LOWER COURTS.

Respondents' reading of the many opinions in *Lehnert*, *supra*, is disingenuous, elevating general statements of this Court and dissents from individual Justices above specific holdings of the Court as to specific categories of union expenditures.

A. No Court Has Distinguished Litigation Expenditures As Respondents Have.

Respondents answer Justice Blackmun's specific rejection of the notion that the general standard "extend[s] ... to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities," 500 U.S. at 528, with mere truisms, general observations appearing as much as **five pages earlier** in the opinion as it appears in the *United States Reports*. Opposition at 6, *citing* 500 U.S. at 523. Indeed, Respondents cite this Court's comments that "'unions may bill dissenting employees for their share of general collective-bargaining costs or the[ir] state or national parent union,' because so long as 'these costs [are found] to be germane to

collective bargaining and similar support services ... [n]o greater relationship is necessary' to make them chargeable to objecting fee payers." Opposition at 6-7, *citing* 500 U.S. at 527.

Respondents ignore that this Court, **in the very next sentence and paragraph in its decision**, goes on to state that "This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities." *Lehnert*, 500 U.S. at 528.

Further, like the District Court, App. E at 48a, Respondents cite Justice Scalia's opinion for the proposition that nonmembers derive a "tangible benefit" from various "on-call" union services, Opposition at 6, though Justice Scalia excluded litigation activities from his list of those "collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance)," *id.* at 561 (Scalia, J., concurring in part), for which nonmembers could be charged on an "on-call" basis. Moreover, Justice Scalia (like every other Justice) declared himself to be bound by and following *Ellis*, *supra*, *see* 500 U.S. at 555 (Scalia, J., concurring in part), which specifically declared that "expenses of litigation not having ... a connection with the bargaining unit are not to be charged to objecting employees." 466 U.S. at 455; **see also** Petition at 17 (discussing in detail Justice Scalia's views on these issues).

However, unlike the panel, Respondents do not ignore that this Court's decision in *Ellis*, 466 U.S. at 453, controls as to the chargeability of extra-unit litigation expenditures. Instead, they misrepresent it, asserting a "conceptual[] differen[ce]," Opposition at 6, where none exists.

Respondents' attempt to distinguish *Ellis*, *see* Opposition at 8, is unavailing, as two courts have recognized.[3] Justices Blackmun

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[3] Apparently guided by the principle that the best defense is a good offense, Respondents feign astonishment that "petitioners do not even attempt a reasoned distinction of such legal activity directly related to collective bargaining from other direct collective bargaining activity." Opposition at 8.

(continued...)

and Scalia **both** recognized that the *Ellis* holding on extra-unit litigation has a constitutional basis. *See Lehnert*, 500 U.S. at 528 (opinion of Blackmun, J.); *id.* at 555 (opinion of Scalia, J.). Moreover, that holding was "an unqualified rule that charges for extra-unit litigation expenses are improper." *Crawford v. Air Line Pilots Ass'n*, 992 F.2d 1295, 1316 (4th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 114 S. Ct. 195 (1993) (Russell, J., dissenting).

> The *Ellis* case makes no exception for litigation that helps the union in a general way or that benefits other bargaining units represented by the union. In order for litigation expenses to be charged to a bargaining unit, the litigation must concern the members of the bargaining unit.

Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123, 1130 (10th Cir. 1991).

Contrary to Respondents' suggestion, *see* Opposition at 8, the litigation at issue in *Ellis* included litigation related to collective bargaining in other units. The "litigation seeking to protect the rights of airline employees generally during bankruptcy proceedings" held nonchargeable in *Ellis*, 466 U.S. at 453, was "intervention in an employee's bankruptcy proceedings [that] protected the union members' wages and **ensured continued compliance with the collective bargaining agreement** while the employer underwent reorganization." *Ellis v. Railway Clerks*, 685 F.2d 1065, 1074 (9th Cir. 1982) (emphasis added), *rev'd in pertinent part*, 466 U.S. 435,

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[3] (...continued)

In this regard, Petitioners hardly can be faulted for emulating this Court and every other appellate court addressing the issue, addressing the only relevant characteristic of litigation activity utilized to determine its chargeability—*i.e.*, its connection to the nonmember's bargaining unit. *Lehnert*, 500 U.S. at 528; see also *Ellis*, 466 U.S. at 453. A union's ability to characterize litigation as "bargaining activity" for other bargaining units is irrelevant.

Additionally, in apparent recognition of their peril, Respondents have shifted their argument. Having successfully convinced the courts below that *Lehnert*'s general test—rather than its specific holding as to this issue—governs, App. B at 8a-9a, 71 F.3d at 623-24, Respondents now claim that *Lehnert* and *Ellis* do not mean what they plainly say!

453 (1984). And, "defending suits alleging violation of the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964" undoubtedly is "a normal incident of the duties of the exclusive representative," but such expenditures were held non-chargeable by *Ellis*, 466 U.S. at 453, unless the nonmembers' "bargaining unit is directly concerned." This is the plain teaching of both *Lehnert* and *Ellis*.

Further, notwithstanding this plain language, Respondents continue to elevate opinions of one or two Justices—those therefore rejected by the Court's majority—into binding precedent of this Court. In the courts below, Respondents suggested that Justice Marshall's lone opinion in *Lehnert* controls; to oppose this Petition, Respondents now claim that Justice Kennedy's solitary concurrence and dissent somehow controls because it "is the *only Lehnert* opinion that directly addresses the issues of 'litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative.'" Opposition at 8, *citing* 500 U.S. at 563 (Kennedy, J., concurring in part and dissenting in part).

Bootstrapping their application of this lone opinion with Justice Scalia's, Justice Blackmun's, and Justice Marshall's, Respondents conclude that "the treatment of litigation in the four *Lehnert* opinions" supports the judgment of the panel below. Opposition at 9. This curious conclusion conflicts with Justice Blackmun's plain statement, 500 U.S. at 528, and with Justice Marshall's recognition, in no less than four different places, that he dissented from "the court's opinion" that extra-unit litigation expenditures are nonchargeable. *See* Petition at 16-17 (detailing Justice Marshall's comments). Perhaps no comment is so *apropos* as that made by a judge of the Fourth Circuit in response to an identical argument: "While the union's suggestion is creative, it is not persuasive." *Crawford*, 992 F.2d at 1316 (Russell, J., dissenting).

Respondents rely upon similar creativity to dismiss the conflict between the panel's decision below with those of other appellate courts, criticizing those courts because "none of these cases presented the distinction between the chargeability of 'litigation [that] is undertaken in the courts of the union's duties as exclusive

bargaining representative.'" Opposition at 9-10; *but see Pilots Against Illegal Dues*, 938 F.2d at 1129-30; *Albro v. Indianapolis Education Ass'n*, 585 N.E.2d 666, 673 (Ind. Ct. App.), *adopted sub nom. Fort Wayne Education Ass'n v. Aldrich*, 594 N.E.2d 781 (Ind. 1992); *Browne v. Wisconsin Employment Relations Commission*, 169 Wisc.2d 79, 485 N.W.2d 376, 388 (1992).

While these courts generally ignored Respondents' tortured distinction because it was rendered irrelevant by this Court's decisions, with regard to *Browne*, Respondents' claim affirmatively misrepresents the decision of Wisconsin's Supreme Court. Respondents assert that "none of these cases presented the distinction between the chargeability of 'litigation [that] is undertaken in the course of the union's duties as exclusive bargaining representative." Opposition at 9. But *Browne* unmistakably does so.

In *Browne*, the court **reversed** WERC's holding "that jurisdictional dispute proceedings, impasse mechanisms, and litigation 'related to concerted activity and collective bargaining' are chargeable, even if the nonunion employees' units are not involved." 485 N.W.2d at 388. The court went on to "conclude that unless the litigation is **directly** related to the objecting employee's **bargaining unit**, it is nonchargeable." *Id.* Thus, *Browne* directly addressed the issue which Respondents assert was not presented in that case.[4]

B. Forced Subsidization Of Extra-Unit Lobbying And Public Relations/Advertising Expenditures Directly Violates Nonmembers' First Amendment Rights.

Respondents criticize Petitioners' challenge to extra-unit public relations/advertising expenditures by casually dismissing their "faulty analogy," Opposition at 10, a charge more properly leveled at the courts below. Like the *Lehnert* panel's majority, the panel below drew an inapt "comparison of public relations expenses to"

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[4] Another state-wide affiliate of the national union, the American Federation of State, County and Municipal Employees (AFSCME), was an intervenor in the *Browne* litigation. 485 N.W.2d at 380.

union expenditures related to preparations for a strike, albeit illegal. App. B at 9a-10a, 71 F.3d at 624.

When it permitted unions to charge nonmembers for preparations for an illegal strike, this Court recognized that a strike is a traditional collective bargaining tool, directed primarily at the employer. The Court rejected objections which may derive "solely from the union's involvement in them," holding that "'the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union.'" *Lehnert*, 500 U.S. at 529, *quoting Ellis*, 466 U.S. at 456, and *citing* 881 F.2d at 1394.

The same cannot be said of extra-unit public relations/ advertising expenditures. For while they may well be strictly limited to bargaining subjects in other units, their objectionable character lies in the public expression of ideas with which the nonmembers may object, and which relate not at all to bargaining over his or her terms and conditions of employment.

Further, Respondents' statement that Petitioners "provide no support for their claim" that such expenditures are chargeable to nonmembers suggests that they missed pages 21-25 of the Petition, which explains in detail why such expenditures, as "speech of a political nature in a public forum," 500 U.S. at 528, have been held by this Court to be nonchargeable outside of the narrow context of the nonmembers' bargaining unit. Thus, Respondents ignore that such expenditures of necessity fail the third prong of the *Lehnert* test, 500 U.S. at 519, for they impact upon nonmembers solely as citizens and taxpayers, not as represented employees.

Instead, Respondents focus only upon the narrow language of *Lehnert*, "public speech in support of the teaching profession generally," 500 U.S. at 528, *quoted at* Opposition at 10, rather than the touchstone identified by this Court, the nature and the quality of that "speech of a political nature in a public forum," *id.*, which renders such expenditures to be nonchargeable. Respondents' stilted interpretation of this language suggests that unions may avoid constitutional mandate simply by artful linguistic dodges.

Stripped to its essence, Respondents' argument boils down to the proposition that the panel alone is correct in its determination that this Court's decisions permit it to compel nonunion City of Columbus employees to subsidize its extra-unit litigation, public relations/advertising, and lobbying, activities undertaken throughout the State of Ohio, and the nation, and that conflicting decisions of other Circuits and state Supreme Courts really do not conflict with the panel's decision. Respondents posit that this Court didn't really mean what it said when it barred charging for extra-unit litigation expenditures in two separate decisions. *Lehnert*, 500 U.S. at 528; *Ellis*, 466 U.S. at 453. No response is more apt than that of the Tenth Circuit, when presented with a like argument: "At bottom, [the union's] argument boils down to a contention that the Supreme Court did not mean what it said in *Ellis*. We think the Court meant what it said." *Pilots Against Illegal Dues*, 938 F.2d at 1130.

CONCLUSION

The petition should be granted as to all questions presented.

Respectfully submitted,

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